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The Many Faces of the State

Owen M. Fiss*

The author examines the state's role in ensuring freedom of speech. Because what is at stake is less the expressive interest of the speakers than the interest of the citizenry hearing debate on issues of public concern, the state, primarily through the judiciary, should act to ensure equal access to the debate. In the controversial areas of hate speech, pornography and campaign finance, the state should serve as a parliamentarian, using its power to guard against the silencing of less powerful voices. A too rigid adherence to the requirement that regulation of speech be content-neutral would seriously impair the state's capacity to serve in this way as a friend of freedom.

L'auteur examine le rôle de l'État dans la garantie de liberté d'expression. Comme l'intérêt expressif des intervenants importe moins que l'intérêt des citoyens à entendre les débats sur les préoccupations publiques, l'État — essentiellement au moyen du pouvoir judiciaire — devrait assurer le même accès à ce débat. Dans le cas de sujets controversés comme la littérature haineuse, la pornographie et le financement des campagnes, l'État devrait adopter un rôle de parlementaire, utilisant ses pouvoirs pour protéger ceux et celles qui ont des voix moins fortes. L'adhérence trop stricte à l'exigence que le contenu du discours doit rester neutre nuirait sérieusement à la capacité de l'État d'être vu comme un ami de la liberté.

Freedom of speech has always been of great interest to constitutional lawyers in the United States. Today is no exception. Although the issues have changed — from the communist menace and subversion in the 1950s to recent debates about pornography, hate speech and campaign finance — the divisions and passions they arouse seem similar to those we have encountered in the past.

It is thus tempting to see the current free speech controversies as a replay of the past, but my claim is that something much deeper and more significant is occurring. Americans are being invited, indeed required, to re-examine the nature of the state and to wonder whether it should play an active role in securing freedom of speech.

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* Sterling Professor of Law, Yale University. This essay builds on an argument that first appeared in *The Irony of Free Speech*, published by Harvard University Press in September 1996. Special thanks are owed to Patricia L. Cheng and Clifford J. Rosky for their assistance.

I.

The debates of the past assumed that the state was the natural enemy of freedom. It was the state that was trying to silence the individual speaker and it was the state that had to be curbed. The First Amendment of the United States Constitution provides that "Congress shall make no law abridging the freedom of speech," and has long been taken as an expression of classical liberalism's demand for limiting state power. Liberalism was never an absolute. Some regulation of speech was always allowed, and as a result specific boundaries had to be drawn around the state. The precise location of those boundaries was the product of a dialectical process that accorded weight both to the values of free speech and the interests advanced by the state to support its regulation, for example, public order or national security. Liberals took these countervalues seriously — as Harry Kalven once put it, free speech is not a luxury civil liberty[1] — but somehow always managed to come out in favour of speech.

Today, however, liberals are divided over the regulation of hate speech, pornography and campaign finance. The countervalues have changed and so has liberalism. While the liberalism of the past sought to expand individual liberty and limit state power, the liberalism of today embraces a plurality of values. Contemporary liberalism is committed to equality as well as liberty and recognizes the role of the government in furthering those rights.

The transformation of liberalism can be traced to a multitude of factors, many of which have no connection to the law. But within the law itself, the most significant factor is the United States Supreme Court's 1954 decision in *Brown* v. *Board of Education*.[2] In this case, black students sued to gain admittance to all-white schools, and the Court ruled in their favour. As a purely technical matter, the decision declared that racial segregation violated the equal protection clause of the Fourteenth Amendment. More broadly, however, it reshaped the Constitution by granting equality a place in the American constitutional order as prominent as that given to liberty and by acknowledging the state's affirmative role in securing that value. Over the last forty years the courts, along with the executive and legislative branches, acted in a coordinated manner to broaden the field of equality and thus to extend *Brown*. As a consequence, more and more spheres of human activity — voting, education, housing, public accommodations, employment, transportation — have come to be covered by

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[1] See H. Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, J. Kalven, ed., (New York: Harper & Row, 1988) at xxii.

[2] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

antidiscrimination law. Now there is virtually no public activity of any significance that is beyond the reach of the equality principle. In addition, the protection of the law has been extended to a wide array of disadvantaged groups — racial, religious and ethnic minorities, women and the disabled. Groups that are defined by their sexual orientation are now demanding inclusion as well. In 1996 these groups won an important victory when the Supreme Court invalidated a state constitutional provision that had barred local laws protecting gays, lesbians and bisexuals.[3]

The current welfare policies of the United States fall short of the lofty ambitions that were proclaimed when the "War on Poverty" was launched in the 1960s. Today we seem more tolerant of economic inequalities, specifically, the concentration of wealth in the hands of a few. But norms protecting the poor against discrimination still have force in select domains, such as the electoral processes and some civil and criminal proceedings.[4] Liberals also remain committed to satisfying the minimum needs of the economically downtrodden. Food, housing and medical care are provided by statutory enactment, though often inadequately and with ever-increasing limitations. Against this background, it is no surprise that in confronting the regulations that generate the free speech controversies of today, many liberals find themselves in a quandary. The liberal commitment to speech remains strong, but it is being tested by exercises of state power on behalf of another defining goal: equality.

The regulation of hate speech, for example, is defended on the theory that such expression denigrates the value of the various minority groups.[5] Equality can also be found at work in the feminist campaign against pornography that attacks pornography not for religious or moral reasons, but on the ground that it reduces women to sexual objects and eroticizes their domination. The claim is that pornography leads to violence against women, including rape, and causes a pervasive pattern of social disadvantage — both in the public sphere and in

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[3] *Romer* v. *Evans*, 517 U.S. 620 (1996).

[4] See *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (criminal appeal); *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996) (parental termination proceeding); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (voting). See generally F. Michelman, "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice" (1973) 121 U. Penn. L. Rev. 962; "The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment" (1969) 83 Harv. L. Rev. 7; "Welfare Rights in a Constitutional Democracy" (1979) Wash. U. L. Q. 659.

[5] See M.J. Matsuda *et al.*, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993).

matters most intimate.[6] Similarly, although some defend the regulation of campaign finance as a means of preventing corruption, it can also be understood as a way of enhancing the political power of the poor. Such regulation puts the poor on a more equal footing with the rich, enables them to advance their interests and gives them a fair chance to enact measures that improve their economic position. One should be careful not to overstate the significance of the present moment as each generation tends to overstate its own uniqueness. Regulations similar to the ones that concern Americans today have been considered by the courts in earlier times. In the case of pornography, for example, the legal framework limiting the censor's jurisdiction over sexually explicit material was primarily forged during the civil rights era of the 1960s.[7] Yet I believe that an important difference can be found in the depth of the legal system's commitment to equality today. In the 1960s, equality was but an aspiration — capable of stirring the nation, but still fighting to establish itself in the constitutional arena. Today, equality has another place altogether in our jurisprudence — it is one of the central beams of the legal order. It is architectonic.

Many liberals readily acknowledge the pull of equality but refuse to capitulate to it. They honour the countervalues, as Kalven once put it, but resolve the conflict between liberty and equality in favour of liberty. The First Amendment should be first, they argue. This position makes claim to the classical conception of liberalism, in which freedom is defined in terms of individual liberty and limited government. But this position seems vulnerable because no reason is given for privileging liberty over equality — for preferring the First Amendment to the Fourteenth. Those privileging liberty often refer to the role that free speech played in securing equality during the civil rights era, suggesting that democratic politics is a precondition for achieving true and substantive equality. That much can be granted, but the converse may also be true: A truly democratic politics will not be achieved until conditions of equality have been fully established.

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6 See C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987) at 127–213 [hereinafter *Feminism Unmodified*]; *Only Words* (Cambridge, MA: Harvard University Press, 1993); *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989). See also A. Dworkin & C.A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

7 Kalven, *supra* note 1 at 35–44.

II.

We can thus understand why liberals are divided, almost at war with themselves: some favour liberty, some equality, but all are without a principled basis for choosing between these defining values. A common ground might be found, however, once we recognize that equality is not just a separate value but also a part of free speech itself. If we consider the ways that hate speech, pornography and campaign finance regulations further speech values, it will become clear that what has been presented as a conflict between liberty and equality is actually a conflict within liberty. Such a reformulation will not eliminate all disagreement, but rather place that disagreement within a framework that acknowledges that both sides are pursuing the same value: free speech.

In the history of free speech, the U.S. government has sometimes defended the regulation of speech in the name of liberty. During the height of the Cold War, for example, suppression of the Communist Party and its leadership was often justified in terms of saving America from Stalinism. The fear was that communist propaganda would, in time, be persuasive and lead to the overthrow of the government or the establishment of a totalitarian dictatorship. Liberals responded that the remedy was more speech, not state regulation.[8] With pornography, hate speech and campaign expenditures, however, the threat to freedom that speech produces is more direct and immediate. There is no intermediary. It is not only that the speech may persuade listeners to act in a certain fashion — contributing, for instance, to the establishment of social institutions that subjugate certain groups. There is also the danger that the speech will make it impossible for such groups even to participate in public discussion. As a result, the classic remedy of more speech rings hollow. Those who need to respond cannot.

Underlying this theory is the view that hate speech tends to diminish the victims' sense of worth and thus impedes their full participation in many of the activities of civil society, including public debate.[9] The victims of hate speech withdraw into themselves. When they do speak, their words lack authority: it is

[8] The doctrine comes from *Whitney* v. *California*, 274 U.S. 357, 372 (1927) (Brandeis J., concurring).

[9] See O.M. Fiss, "The Right Kind of Neutrality" in *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996) 111 [hereinafter *Liberalism Divided*].

as though they had said nothing. The same silencing effect has been attributed to pornography. The claim is that pornography silences women by reducing them to sexual objects, which not only subordinates them but also impairs their credibility and their capacity to contribute to public discussion.[10] Similarly, unlimited political expenditures might drown out the voices of the poor.[11] The rich might so dominate advertising space in the media and other public domains that the citizenry, in effect, hears only their messages. Admittedly, in each of these cases the agency threatening speech values is not the state itself. But there is no need for the threat to come from the state for it to be a legitimate subject of regulation. The call for state intervention is based not on the theory that the activity to be regulated is itself a violation of the First Amendment, but rather on the idea that protecting the fullness of public discourse — making certain that the public hears all sides of the debate — is a permissible regulatory goal for the state. Accordingly, even if the silencing dynamic that I have described is wrought solely by private hands — for example, by the person who hurls racial epithets, publishes pornography or uses superior economic resources to dominate political campaigns — there is full and ample basis for intervention. The state is merely exercising its police power to further a worthy public end, as it does when it enacts gun control or speed limit laws. In this instance, the end happens to be a conception of democracy that requires that the speech of the powerful not drown out or impair the speech of the less powerful.

The promotion of democratic values is a worthy and compelling public purpose, but a question can be raised about the method by which that goal is pursued, specifically, whether the intervention of the state is consistent with the First Amendment. State regulation of the type proposed might promote the speech of minorities, women and the poor, but only by silencing racists, pornographers and the rich. What gives the state the right to privilege the speech rights of one group over the rights of the other? The answer to this question depends in large part on how we conceive of the speech interests at stake. If nothing more were involved than the self-expressive interests of each group — say, the desire of the racist and the interest of the would-be victim each to speak

[10] See O.M. Fiss, "Freedom and Feminism" in *Liberalism Divided*, *ibid.* at 67; C.A. MacKinnon, "Francis Biddle's Sister: Pornography, Civil Rights, and Speech" in *Feminism Unmodified*, *supra* note 6, 163; R. Langton, "Speech Acts and Unspeakable Acts" (1993) 22 Phil. & Pub. Aff. 293.

[11] See *Buckley* v. *Valeo*, 424 U.S. 1, 257 (1976) (White J., concurring in part and dissenting in part); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 802 (1978) (White J., dissenting); *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 303 (1981) (White J., dissenting). See generally O.M. Fiss, "Money and Politics" (1997) 97 Colum. L. R. 2470.

his or her mind — then there would be something arbitrary about the state choosing one side over the other. In fact, something more is involved: the quality of public debate. The state is not merely arbitrating between the self-expressive interests of various groups, but pursuing a public interest. It is seeking to establish the preconditions necessary for collective self-governance by making certain that all sides are presented to the public.[12] Sometimes that objective can be achieved by affirmative measures, such as the grant of subsidies, which would empower disadvantaged groups and enhance their voices. Sometimes, however, such strategies are not effective and the state might need to lower the voices of some in order to hear others.

In conceiving of state regulations of hate speech, pornography and campaign finance in this manner, equality once again makes an appearance. But the value is now rooted in the First Amendment, not the Fourteenth. The concern is not with the social status of the groups that might be injured by the speech whose regulation is contemplated. Rather, the concern is with the claim of those groups to a full and equal opportunity to participate in public debate — the right of disadvantaged groups to free speech. In defending this right we must remember that what is at stake is less the expressive interest of the speakers than the interest of the audience — the citizenry — in hearing a full and open debate on issues of public importance.

III.

Analyzing the problems presented by hate speech, pornography and campaign finance in this way might seem to accord easily with the traditional framework that analyzes every speech issue as a conflict between value and countervalue. In this case, it turns out that the countervalue is not a familiar state interest such as public order or national security, nor the more alluring equality, but speech itself. Thus, one way of describing the conclusion we have arrived at is simply to say that now speech appears on both sides of the equation — as the value threatened by the regulation and the countervalue furthered by it. This way of putting the matter, however, radically understates the challenge we confront, for we are not simply reconceptualizing the countervalue and acknowledging that it might be speech itself; we are also reconfiguring the role of the state. While the traditional framework rests upon the classical liberal idea that the state is a natural enemy of freedom, liberals are now beginning to imagine the state as a friend of freedom.

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[12] See O.M. Fiss, "Why the State?" in *Liberalism Divided*, *supra* note 9, 31.

The resistance in the U.S. to this reversal of the role of the state is considerable. Some is founded on an absolutist reading of the First Amendment, which treats the free speech guarantee as a bar to any state regulation of speech whatsoever. This view of the First Amendment, long associated with Justice Black,[13] proclaims that "no law" means "no law," and although it has considerable rhetorical sweep, there is little else to recommend it. The First Amendment, Meiklejohn reminded us, prohibits laws abridging "the freedom of speech," not the freedom to speak.[14] The phrase "the freedom of speech" implies an organized and structured understanding of freedom and the need for the rational elaboration of the limits on speech. The First Amendment is not reducible, in Meiklejohn's phrase, to a protection of "unregulated talkativeness."[15] The Court has allowed the state to regulate speech for such public purposes as the protection of national security and public order and should be of a similar mind when the state seeks to promote the robustness of public debate. Indeed, one can go further and say that the Court should embrace such regulation because it seeks to further the value that underlies the First Amendment itself: collective self-determination.

A majority of the Court has never taken kindly to Black's absolutism. Indeed, with the exception of William O. Douglas, no other justice has ever supported it. Over the last two decades, however, the Court has forged a more general principle — the requirement of content neutrality — that would seriously impair the state's capacity to protect freedom. According to this principle, a very strong presumption arises under the First Amendment against any regulation that is structured in terms of the content of speech.

In the case of campaign finance, the Court has used the concept of content neutrality to bar Congress from placing ceilings on political expenditures. In its 1976 decision *Buckley* v. *Valeo*,[16] the Court invalidated major portions of a federal campaign reform act on the ground that the First Amendment prohibits the state from restricting the voice of some so as to enhance the voice of others. Although no justification was offered for this stance when it was initially proclaimed, in later cases the Court explicitly linked *Buckley* to the principle of

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[13] See *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (Black J., concurring); H.L. Black, "The Bill of Rights" (1960) 35 N.Y.U. L. Rev. 865.

[14] See A. Meiklejohn, "The First Amendment is an Absolute" (1961) Supreme Court Rev. 245 at 255.

[15] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper, 1960) [hereinafter *Political Freedom*].

[16] 424 U.S. 1 (1976).

content neutrality.[17] On the issue of hate speech, the Court has not been so coy. In its 1992 decision *R.A.V.* v. *St. Paul* — a case in which a teenager had been convicted of burning a cross on a black family's yard — the Court struck down the City of St. Paul's hate speech ordinance on the ground that it was not content-neutral.[18] The Court assumed the ordinance proscribed only "fighting words," a category of expression that is within the power of the state to regulate or even suppress. Yet the Court invalidated the ordinance because those advocating tolerance were allowed more freedom than those opposed to it. Only the fighting words of the intolerant were prohibited.

Although the Supreme Court has long allowed the regulation of obscenity, provided that such regulation stays within narrowly defined bounds,[19] it has not yet had occasion to review a regulation specifically structured to respond to the feminist campaign against such material. Its analysis of hate speech regulations, however, may be read as an indication of how it would rule. In writing for the majority in *R.A.V.*, Justice Scalia presumed that a partial regulation of obscenity — a law that proscribed only obscenity that was critical of the city government — would be unconstitutional because it transgressed the rule requiring content neutrality.[20] Several years earlier a similar line of reasoning was used by Judge Frank Easterbrook in the Seventh Circuit Court of Appeals to strike down an Indianapolis ordinance aimed specifically at sexually explicit material that subordinated women.[21] Clearly, there are many situations in which the principle of content neutrality has powerful appeal. It would, for example, violate democratic principles if the state protected the demonstrations of people favouring the right to an abortion, while clamping down on pro-life forces.[22] In such a case, the state would simply be choosing sides — favouring certain outcomes by manipulating debate — and thus interfering with the free and sovereign choice of the public. But content neutrality is not an end in itself and should not be read to bar interventions that enhance choice, even though they regulate content. Some regulation of content may be necessary to make certain that all sides are heard. In such cases, the state would be acting in much the same way as a fair-minded parliamentarian might and should thus be seen as a friend

[17] See *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986).

[18] *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992).

[19] See *Miller* v. *California*, 413 U.S. 15, 24–25 (1973).

[20] *Supra* note 18 at 384.

[21] *American Bookseller Ass'n.* v. *Hudnut*, 771 F.2d 323 (1985).

[22] See *Madsen* v. *Women's Health Center*, 512 U.S. 753 (1994); *Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); O.M. Fiss, "The Unruly Character of Politics" (1997) 29 McGeorge L. Rev. 1.

of speech. In an earlier period, scholars such as Alexander Meiklejohn and Harry Kalven acknowledged that the state might have to act as a parliamentarian. But, by and large, it was assumed that the state would discharge that function by simply following Robert's Rules of Order — a predetermined method of proceeding based not on what was transpiring in the debate, but rather on some universal principle like temporal priority.[23] Today, such a policy might not be sufficient. Account has to be taken of a wide variety of factors that curtail debate, such as the scarcity of speech opportunities and the inequalities of resources. The parliamentarian might have to say, "We heard a lot from that side already. Perhaps others should get a chance to speak before we vote." A parliamentarian might also have to be sensitive to the excesses of advocacy and the impact that they have on the quality of debate. At times the chair might have to interrupt: "Can't you restrain yourself? You have been so abusive in the way you have put your point that some have withdrawn from the debate altogether."

Of course, any regulation of debate, including the ones just mentioned, may have an impact upon decision-making processes. Regulation of process always affects outcome. In that sense, the breach of the content neutrality principle in the regulation of pornography, hate speech and campaign finance might therefore seem similar to the state intervention in the abortion protest cases mentioned. But there is a critical difference. When the state acts as a parliamentarian, making sure that all sides are heard, the impact upon outcome is derived from the fact that both sides of the issue are heard rather than one and thus democracy is furthered. What democracy exalts is not simply choice by the public, but rather choice made with full information and under suitable conditions of reflection. In characterizing the state as a parliamentarian, and seeing this as a way of understanding regulations of pornography, hate speech and campaign finance, I am treating society as if it was one gigantic town meeting. In that respect I am following Kalven and, before him, Meiklejohn.

Recently, Professor Robert Post insisted that such a view of society rests on antidemocratic premises.[24] According to Post, while town meetings take place against a background in which the participants agree — sometimes implicitly or informally — to the agenda and the procedures of debate, no such assumptions can be made about civil society. In the constant conversation that is civil society, no one is ever out of order and no idea is ever beyond consideration. When the

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[23] See *Political Freedom*, *supra* note 15 at 24–28; H. Kalven, Jr., "The Concept of the Public Forum: *Cox* v. *Louisiana*" (1965) Supreme Court Rev. 23.

[24] R.C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995) at 268.

state intervenes in public debate, even when it does so to improve its quality, it must impose upon the citizens a certain conception of what should be discussed and who must be able to speak. Post believes that such action by the state forecloses the radical individualistic — almost anarchic — premises of democracy. Genuine democratic principles, he argues, require that citizens be permitted to set the public agenda themselves and always remain free to reset it. They must also be able to set their own rules of procedure. Every town meeting does indeed presuppose an understanding about the agenda and the rules of procedure. There must be some standard of relevance and an order of proceeding. Yet these understandings have their counterpart in society at large. They are not the product of an agreement among citizens or dictatorial action by the state. Rather, they evolve organically, as do most shared understandings. Of course, when the state acts upon any such understandings, as it must when it seeks to enlarge public discussion, to enhance the voice of some or to focus attention on issues of public importance, it must foreclose some of the anarchic possibilities celebrated by Post — the freedom of any single individual, for example, to redefine the agenda or to determine the rules of procedure. But to require the state to forgo such action does not further the freedom of the individual, but rather means that the individual will be controlled by the social forces that dominate society. The state is our common instrument and its power must sometimes be used to prevent social forces — represented by the cross-burner, the pornographer or the big spender — from foreclosing the right of other citizens to participate in the debate itself or collectively to determine the agenda and the rules of procedure.

Post's objection aside, there is always good reason to be wary of the state. The state is not just a parliamentarian. It is also an embodiment of distinctive substantive policies and those who possess its power have a vested interest in how debates are resolved. Sly politicians can say that they are regulating content solely to enrich public debate and to make certain that the public hears from all sides, but their purpose may in fact be to fix the outcome or further certain substantive policies. Although this danger is ever present, it is particularly acute in the campaign finance area, where the risk is high that incumbents may use their power to insulate themselves from the challenges of newcomers.

Those in charge of designing institutions should therefore place the power to regulate content — to act as parliamentarian — in agencies that are removed from the political fray. It is never a good idea to choose as your chair someone who is keenly vested in one outcome. For this reason the heavy burden of scrutinizing the action of the state should fall on the judiciary because it stands apart from the political fray. In discharging this task, the reviewing court must

ask itself: does the intervention enhance the quality of debate, or does it have the opposite effect? Even a vigilant judiciary may not be able to guard against all abuses of enlarged regulatory power. We should worry about possible judicial failures and the dangers they present to freedom of speech, but we must be careful not to exaggerate their significance. They will not unleash or otherwise validate a censorial power that is at war with the First Amendment. The judiciary may not always be able to prevent a devious politician from manipulating process to determine outcome. But statutes that regulate pornography, hate speech and campaign finance do not give the state the power to suppress speech arbitrarily. What Justice Brennan called the "bedrock principle" of the First Amendment[25] — no state official should have the power to suppress an idea because he or she disagrees with it — is preserved.

There is no denying that a more powerful state creates dangers, but the risk of these dangers materializing and an estimate of the harm that they could bring into being has to be weighed against the good that will be accomplished. The potential of the state for oppression should not be slighted. At the same time, however, we must contemplate the possibility that the state will use its considerable powers to promote goals that are an unqualified good — equality and perhaps even free speech itself. The current debate in the U.S. over hate speech, pornography and campaign finance forces us to acknowledge this possibility and thus to reflect in a new way on the nature of the state and what we have a right to expect from it.

[25] *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989).

SEARCHING FOR MULTINATIONAL CANADA: THE RHETORIC OF CONFUSION

Alan C. Cairns*

The phrase "multinational Canada" has recently emerged in scholarly analysis, in the report of the Royal Commission on Aboriginal Peoples and elsewhere as a label for a claimed sociological reality that deserves constitutional recognition. Unfortunately, the phrase has acquired a certain legitimacy before its credentials have received the scrutiny that should be accorded all future visions. This article undertakes that task. It concludes that a full-blown "multinational Canada" is conceptually incoherent and has limited utility for policy-makers. Any comprehensive attempt to redesign Canada as a multinational polity would come with a heavy price tag. Most significantly, the civic solidarity we now share with fellow citizens would be replaced by a much weaker solidarity with the members of other nations, now viewed as quasi-strangers. The members of Aboriginal nations would be the major losers. While a full-blown response to multinational Canada would be unwise, a carefully modulated, less ambitious response deserves consideration.

L'expression «Canada multinational» est récemment apparue dans une analyse scientifique, dans le rapport de la Commission royale sur les peuples autochtones et ailleurs comme une étiquette d'une soi-disant réalité sociologique digne d'une reconnaissance constitutionnelle. Malheureusement, l'expression à acquis une certaine légitimité avant même que ses pouvoirs n'aient fait l'objet de l'étude minutieuse qui devrait être accordée à toutes les visions futures. L'article porte justement sur cette tâche. L'auteur conclut que l'expression «Canada multinational» est incohérente du point de vue conceptuel et qu'elle présente peu d'utilité pour les responsables des politiques. Toute tentative générale de revoir le Canada en tant que politie multinationale s'avérerait onéreuse. Tout d'abord, la solidarité civique que nous partageons avec nos concitoyens serait remplacée par une solidarité plus faible avec des membres d'autres nations que nous considérons aujourd'hui comme quasi-étrangères. Les membres des nations autochtones auraient le plus à perdre. Alors qu'une réaction complète à un Canada multinational n'est pas indiquée, une réaction soigneusement modulée et moins audacieuse mérite considération.

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This essay is the text of the McDonald Lecture delivered on 30 March 1999, at the Faculty of Law, University of Alberta. The risk that I will inadvertently confirm the accuracy of my subtitle has haunted me since I indicated my topic for this lecture to the Centre for Constitutional Studies. My selfish purpose in proceeding is to clarify my own thinking on a developing discourse which defines Canadians as a multinational people. The question that I will address, which should be of interest to others, is whether the discourse of our multinational nature is contributing to a reasonably coherent and viable constitutional portrait of who we are and where we might go. Does it inform us, misinform us or something in between?

I. INTRODUCTION

The self-descriptions that citizens of a complex polity apply to themselves provide important clues about the fit between their self-images and the official definitions of peoplehood embedded in the constitutional order. When the fit is poor, the constitutional order is challenged. In the Canadian case, Canadian, provincial and territorial identities are continually reinforced by the day-to-day transactions between citizens and their governments. Formerly, these federal identities were, for many, supplemented by a British identity based on the idea of a motherland. Britishness was officially sanctioned by the reference in the Preamble of the *BNA Act* to a "Constitution similar in Principle to that of the United Kingdom,"[1] and psychologically reinforced until the middle of the twentieth century by vicarious identification with the globe-straddling British empire.

The erosion of British identity following World War II, which coincided with a triumphant centralism in the federal system, initially appeared to benefit a pan-Canadian identity supportive of the federal government. After all, leading English-Canadian scholars in the early post-war years saw only a minor peripheral role for provincial governments.[2] They did not foresee Québec nationalism, let alone Aboriginal nationalism. Further, their focus on Canadian nation-building deflected their attention from the coexisting reality of province-building, which belatedly emerged as a counter-label in the 1960s,[3] with its reminder that the very structure of federalism reinforced a divided sense of our civic selves.[4]

The shifting balance of imperial, Canadian and provincial identities over time, and the varying conceptions of community in which they were embedded, reflected an evolutionary rearrangement of what might be termed "official" identities — by which I mean identities which flowed naturally from developing understandings of "who we are" that originated at the 1867 beginning. The discourse that attended their evolution was a controlled discourse, which in time

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1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, Preamble, (formerly *British North America Act*).

2 J.A. Corry, "Constitutional Trends and Federalism" in A.R.M. Lower, *et al.*, *Evolving Canadian Federalism* (Durham, NC: Duke University Press, 1958) 92 at 106–108.

3 E.R. Black & A.C. Cairns, "A Different Perspective on Canadian Federalism" (1966) 9 Can. Pub. Admin. 27.

4 R. Vernon, "The Federal Citizen" in R.D. Olling & M.W. Westmacott, eds., *Perspectives on Canadian Federalism* (Scarborough: Prentice-Hall Canada, 1988) 3.

became a traditional discourse. It was controlled by constitutional documents that spelled out the federal, provincial and imperial dimensions of our existence. This evolution was monitored and guided by various guardians — by judges and elected office-holders on both sides of the Atlantic, and by the intellectual class, including prominent journalists such as John Dafoe and Andre Laurendeau, and academic commentators, among whom law professors played a leading role.[5] Its traditional nature was underlined by the practice of seeking to control the future by favourable interpretations of the past — of what the Fathers had intended and whether the *BNA Act*, as interpreted, reflected or distorted their intentions. The debate about whether or not Confederation had been a compact and, if so, among whom, was a classic example of the historical roots of constitutional controversy. The compact theory debate was, of course, a debate about the relative priority of the communities that made up Canada, including the Canadian community.

From the perspective of the early years of the twenty-first century, these constitutional arrangements and the civic identities they reflected and reinforced — British, Canadian, provincial, supplemented by a limited version of French-English dualism, with the recognition of the French fact largely restricted to Québec and to a secondary role in Ottawa — deserve the label of the "old constitutional order." The latter did not confine itself to offering positive support to some identities; it accorded stigmatized identities to Indians who were defined as wards, culturally assaulted and denied full membership in the civic community.

The old constitutional order was, of course, not static. It was subject to the strains born of the standard federal tension between centrifugal and centripetal forces, supplemented by cultural-linguistic tensions lucidly captured in the cultural defence of provincial autonomy vigorously mounted by the Tremblay Report in the mid-1950s.[6] The idea of a traditional discourse should not, therefore, suggest a smothering, sleepy consensus endlessly repeating itself as generations came and went. Rather, it suggests the availability of a common language and of agreed rules of the constitutional game which routinized controversy. We knew how to fight.

The old constitutional order rested on certain assumptions, including the belief that Aboriginal peoples would die out before the onslaught of Western

[5] A.C. Cairns, "The Judicial Committee and its Critics" (1971) 4 Can. J. Pol. Sc. 301.

[6] Québec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Québec, 1956).

disease and culture, or would be assimilated into the majority population or, if neither of the preceding occurred, would remain marginalized on the sidelines as second-class citizens unworthy of full membership in the civic community. For non-Aboriginal policy-makers, a positive future existence for the Indian population as separate peoples, let alone as nations, was neither a goal nor a possibility. For most of the first century after Confederation, Inuit — then called Eskimo — were so distant, isolated and few in number that they were only considered as part of the Canadian community as an afterthought, if at all. The Métis were, to their chagrin, the "forgotten people." This intellectual climate precluded any necessity to think of Aboriginal peoples as component parts of a multinational Canada, a phrase on nobody's lips in the first century after Confederation. Official policy was brutally summed up by Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs (1913–32) in 1920. In language which took for granted that Indians were not part of the audience for his remarks, he asserted: "I want to get rid of the Indian problem ... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department ..."[7]

Outside of Québec, the dominant constitutional thought of the old constitutional order as elaborated in English Canada viewed the French side of French-English dualism as having an adequate outlet in a province with a French majority. Further, constitutional thought outside Québec often assumed that should modernization occur, the resultant cultural convergence would minimize tensions thought to be the product of divergent values. According to J.R. Mallory, "even the most liberal" English-speaking Canadians for most of Canada's first century "regarded French Canada as little more than a transitory source of trouble and discomfort which, in the long run, would somehow be solved by the ultimate penetration of the forces of "progress" into Québec. Meanwhile it was best to let sleeping dogs lie."[8] Finally, it was hoped that Anglo conformity outside Québec would lead to the disappearance of the lingering presence of identities and cultural practices of immigrants — largely European — originating outside Anglo-Saxondom. Would-be immigrants from more exotic parts of the globe, whose assimilative potential was considered

[7] A.C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000) at 17 [hereinafter *Citizens Plus*].

[8] J.R. Mallory, *The Structure of Canadian Government* (Toronto: Macmillan of Canada, 1971) at 395.

problematic, were, on the whole, turned away at the door until the 1960s.[9] The constitutional thought just discussed and the social assumptions on which it rested had one further characteristic. It was, on the whole, a product of a constitutional culture permeated with Britishness. Its reception by the Francophone majority in Québec and by Aboriginal peoples was at best problematic. It is impossible to read the post-Confederation history of Québec up to the Quiet Revolution of the 1960s without being struck by the tenacity of the impulse to survive and to preserve a distinct Francophone presence in North America. The evidence is endless, and requires little elaboration here.

That survival, and the profound self-consciousness of the smaller "founding nation" that drove it, was accompanied by an "extreme suspicion" of Ottawa and by "considerable scepticism as to English Canada's ability and desire to understand French Canada." The authors of the previous remarks in the *Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* were struck by the tenacity of many English-speaking Canadians to see Canada as "essentially an English-speaking country with a French-speaking minority to which certain limited rights have been given."[10]

Québec constitutional thought consistently emphasized that Confederation was a pact, either between provinces or between what were then called the two "races." The Québec view stressed provincial autonomy as the vehicle to protect the French fact, tenaciously opposed the centralizing impulse that it detected in the intellectual class outside Québec, and in general approved constitutional arrangements which safeguarded Québec's constitutional space and opposed those which threatened it.[11]

The tenacity of Aboriginal peoples marginalized by policy (status Indians), by isolation (Inuit), or by disrespect and forgetfulness (Métis) in preserving a sense of their difference also challenged majority assumptions that they were on

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9 F. Hawkins, *Canada and Immigration: Public Policy and Public Concern*, 2nd ed. (Montreal and Kingston: McGill-Queen's University Press, 1988) at c. 1.

10 Canada, *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1965) at 28, 125.

11 E.R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal and London: McGill-Queen's University Press, 1975) at 149–201; L.P. Pigeon, "The Meaning of Provincial Autonomy" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964) 35; J. Beetz, "Les Attitudes Changeantes du Québec a l'endroit de la Constitution de 1867" in P.A. Crepeau & C.B Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) 113.

the road to assimilation. Their counter-constitutional theory was, one might say, expressed in their behaviour — increased numbers after the ravages of disease had been checked, limited interest by status Indians in the "gift" of enfranchisement and recurrent Indian challenges in the courts, in petitions and in sporadic political activity in an environment hostile to its expression. In brief, the dominant constitutional thought of the old constitutional order was underinclusive. It rested on premises concerning Québec Francophones and Aboriginal peoples that did not anticipate their respective nationalisms which now confront us.

All of these assumptions have been relegated to yesterday's world. The Aboriginal population is growing rapidly, and a distinct Aboriginal presence is now assumed as a permanent feature of Canadian society. Assimilation has been displaced by Aboriginal nationalism seeking expression in a third order of government. To the chagrin and surprise of social science, which saw modernization as an instrument for the progressive erosion of cultural diversity and the separate identities assumed to be inextricably linked to it, cultural convergence and identity divergence is not the oxymoron it was formerly thought to be.

Reginald Whitaker comments correctly that, in contrast to earlier eras, by the 1970s "it could be said with confidence that the distinctiveness of Québec society was marginal (measured most importantly in slight variations in life-style and consumption preferences in corporate marketing surveys), except in one fundamental aspect: the primacy of the French language. Otherwise, Québec society had come to represent a regional variation of North American mass culture."[12] Simultaneously, however, a politicized Francophone identity in Québec dramatized the thesis that Québec could not be a province like the others.[13] Those who saw cultural convergence as the vehicle for identity convergence have been dumbfounded by the reality that the erosion of cultural difference has been accompanied for both Aboriginal peoples and the Québec majority by the strengthening of separate national identities. The modernization of Québec has progressively eroded the cultural differences between French and English that the Tremblay Report of the mid-1950s had portrayed as two largely

[12] R. Whitaker, "Quebec's Self-Determination and Aboriginal Self-Government: Conflict and Reconciliation?" in J. Carens, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal and Kingston: McGill-Queen's University Press, 1995) 193 at 196.

[13] W. Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Don Mills, Ont.: Oxford University Press, 1998) at 150–53.

incommensurable solitudes, while simultaneously Québec Francophone nationalism reinforces a national political identity which chafes at the restrictions of provincialism, particularly when reinforced by the doctrine of the equality of the provinces. In parallel fashion, the weakening of Aboriginal cultural difference from the majority has been accompanied by the growth of an assertive Aboriginal nationalism.

Finally, the immigration-induced transformation of Canada's ethnic demography has changed the public face of Canada's major metropolitan centres.[14] This has triggered the emergence of new labels such as visible minorities, made "race relations" a central issue on the public policy agenda and pulled multicultural policy away from its original focus on the non-British, non-French immigrant European communities. Multicultural policy, possibly more appropriately to be thought of as multiracial policy as we enter the twenty-first century, has focused in recent decades on the incorporation and recognition of Asian, African, West Indian, Middle Eastern, South American and other arrivals from non-traditional source countries for immigrants.

The preceding challenges to "old Canada" are supplemented by an explosion of particularistic civic identities, whose emergence was greatly stimulated by the introduction of the *Charter of Rights and Freedoms*,[15] which coincided with a decline of deference. The *Charter* simultaneously established a floor of common coast-to-coast rights, mostly not confined to citizens, and addressed Canadians in terms of particular traits/identities — race, sex, religion, age, disability, *etc.* — which then stimulated mobilization around the differences singled out for *Charter* recognition. The Janus face of the *Charter* thus manages simultaneously to address our commonality, while reinforcing our heterogeneity. In both of its faces, the *Charter* challenges the priority which federalism accords to territorial identities, initially by the basic Canadianness of its message — *Charter* rights are not provincial — and also by the fact that members of the social categories guaranteed equality rights, language or Aboriginal rights (also in section 35 of the *Constitution Act, 1982*) do not see themselves in provincial terms, but in terms of their *Charter*-recognized identities. The *Charter*, in other words, generates centrifugal pressures within provinces and a Canadian rights-bearing identity that transcends provinces. The possessors of *Charter* rights were labelled and came to see themselves as *Charter* Canadians — a phrase which indicated that their link to the constitution was through the *Charter*, and that as

[14] D.R. Cameron, "Lord Durham Then and Now" (1990) 25 J. Can. Studies 5 at 14–21.

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

a result they had stakes in the constitution.[16] The *Charter* was the central instrument in a “Citizens’ Constitution,” which could be contrasted with the “Governments’ Constitution” focusing on federalism, especially the division of powers.

That Canadianizing and deprovincializing message was indeed the *Charter*’s major political purpose.[17] For Prime Minister Pierre Elliott Trudeau, the *Charter* was always more than a simple rights-protecting instrument. Its constitutional objective was (1) generally to weaken centrifugal provincialism by strengthening a contrary rights-bearing Canadianism, and (2) specifically to weaken Francophone nationalism. The latter required underlining the pluralism of Québec society by offering linguistic support to the Anglophone minority, and also challenging the idea of Québec as the only sanctuary for the survival of the French language by strengthening Francophone Canada outside Québec.[18] Further, the *Charter* norm of equal citizenship was clearly unfriendly to such concepts as distinct society, special status and asymmetrical federalism.

As the preceding suggests, the identities that are relevant to civic life are always in flux. While they are not arbitrary or casual, neither are they fixed and unalterable. They evolve in interaction with our constitutional arrangements. The constitution speaks positively to some of our identities, ignores others and may aggressively stigmatize those who are defined as unworthy.[19] Society and the constitution are involved in constant exchanges over the question of who we are. The contrast between the relative stability of constitutional arrangements and the unceasing transformations of modern society ensures that a stable equilibrium is a rare and always temporary achievement.

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[16] “Charter Canadians” was first used in A.C. Cairns, “Citizens (Outsiders) and Government (Insiders) in Constitution-Making: The Case of Meech Lake” in A.C. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, D.E. Williams, ed., (Toronto: McClelland and Stewart, 1991) 108 at 133, originally published in (1988) 14:(suppl.) Can. Pub. Policy S121.

[17] P.H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983) 61 Can. Bar Rev. 30; A.C. Cairns, “Reflections on the Political Purposes of the Charter: The First Decade” in A.C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, D.E. Williams, ed., (Toronto: McClelland and Stewart, 1995) 194 at 197–99 [hereinafter *Reconfigurations*].

[18] K. McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Don Mills, Ont.: Oxford University Press, 1997).

[19] A.C. Cairns, “Constitutional Stigmatization” in P.J. Hanafin & M.S. Williams, eds., *Identity, Rights and Constitutional Transformation* (Ashgate: Aldershot, 1999) 13.

We should neither underrate the potency of particular concepts of identity — for when skilfully employed they have tremendous mobilizing capacity — nor assume their permanence. Our predecessors did not anticipate the profusion of politicized identities that confront us at the millennium, and fifty years hence our successors will look back in wonderment on our necessarily fumbling attempts to both anticipate and guide our own evolution as a people. Accordingly, the incoherence and confusion which attend our efforts to come to grips with the assertion that we are now a multinational people, described below, should not surprise us.

II. THE EMERGENCE OF MULTINATIONAL CANADA

How we talk about ourselves is important. Positive changes in the language of self-description are claims to a new kind of recognition. When such changes apply to component parts of the larger political community, they challenge the existing distribution of power and status. At the turn of the century, evidence of the transformative impact of labelling surrounds us. In 1993, Jenson observed that "the public discourse of contemporary Canada is aswirl with competing styles of naming nations."[20] "Nation" and "multinational" are clearly key words in a people's self-description. The overall description of Canada as a multinational country, while not yet a commonplace, has become frequent enough to suggest a new era.

The historic pan-Canadian civic nation no longer satisfies the varied demands for national recognition of many of its citizenry. "Nation" also threatens the monopoly of standard provincehood as the vehicle for the institutional expression of diversity. Small populations preclude provincial status as the vehicle for recognizing Aboriginal nations. Further, the resort to nation-specific treaties for individual Aboriginal nations necessarily leads to a multitude of particularistic arrangements that will institutionalize multiple asymmetries. The Royal Commission on Aboriginal Peoples (RCAP) recommended the recognition of sixty to eighty Aboriginal nations, each enjoying a separate treaty arrangement with Canada, and constitutionally entrenched in a new third order of Aboriginal governments.[21] Further, given the contemporary propensity of small Indian bands to add the word nation to their official name, Canadians face the prospect of well over a hundred, possibly several hundred, nations within the country. The recognition of the Québec nation sought by nationalists always

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[20] J. Jenson, "Naming Nations: Making Nationalist Claims in Canadian Public Discourse" (1993) 30 Can. Rev. Sociol. & Anthrop. 337 at 338.

[21] Cairns, *Citizens Plus*, *supra* note 7 at 116–60.

embodies a claim to some jurisdictional differentiation of Québec from the other provinces, the rationale for "distinct society." Further, the debate about Québec's special status as a response to its distinctiveness necessarily suggests the existence of another potentially national actor — Canada outside Québec — as a separate community that has a rhetorical "otherness," indeed "nationness," imposed on it. The somewhat unflattering label "Rest of Canada" (ROC) clearly indicates that it is a by-product of Québec's nationalist striving, rather than a passionately pursued alternative identity.

A constitutionalized multinational Canadian future, therefore, would dramatically take us away from a territorial, provincial federalism that is hostile to asymmetry and marches behind the banner of equality of the provinces. It would contain a Québec nation with powers greater than a province, a ROC nation which would be internally federal and thus far from the institutional or constitutional replica of its Québec partner, and at a minimum dozens, possibly several hundred, small Aboriginal nations. Federal officials unhesitatingly employ the phrase Aboriginal nations, or First Nations. The RCAP defines Canada in multinational terms.[22] The Québec government sees our present situation as multinational, identifying ROC or English Canada as a national partner, and recognizing eleven Aboriginal nations within Québec with which the Québec government is prepared to bargain nation-to-nation.[23]

The idea that only the pan-Canadian community deserves the label nation may not have been reduced to a fugitive existence, but it has lost its hegemony. Indeed, much of the rhetoric of Québec and Aboriginal nationalisms implicitly, if not explicitly, reduces the Canadian nation to a limited, shadowy existence, more like an arrangement of convenience or a container than a vibrant community. Internal nations are here to stay, at least for any middle-range future we care to visualize. They are unlikely to give up such a dignifying rhetoric for some lesser labelling.

Analysis of, and often support for a multinational definition of Canada, is no longer a rarity in the academic community of social scientists, political theorists and others.[24] The RCAP explicitly locates its proposed sixty to eighty Aboriginal

[22] *Ibid.* at 132.

[23] Québec, M.G. Chevrette, Ministre responsable des Affaires autochtones, Conference de presse, "Nouvelles orientations du gouvernement du Quebec concernant les questions autochtones" (2 April 1998).

[24] Kymlicka, *supra* note 13; Cairns, *Reconfigurations, supra* note 17; Jenson, *supra* note 20; A.C. Cairns, "Multinational Canada vs. Federalism" in C. Burton & J. Peng, eds., *Political Systems in Canada and Other Western Democracies: Canadian and Chinese Perspectives*

nations in a multinational Canada struggling to find institutional and constitutional expression. It manages to support a multinational definition of Canada without informing its readers who the other non-Aboriginal national actors are. An influential RCAP commissioner, Paul Chartrand, recently elaborated on our multinational nature in an interview. He suggested there were thirty-five to fifty distinct Aboriginal nations in Canada, "meaning peoples in the usually accepted international sense of a group with a common cultural and historical antecedence — a feeling that we are distinct historical communities, social-political communities." Recognition of this reality requires "developing an institutional vision of Canada in which these historical indigenous nations *matter* and they're *included*. That vision means a *multinational* vision of Canada."[25] Several scholars have written about the conflict between Québécois and Aboriginal nationalism in Québec.[26] I have incorporated multinationalism into some of my own work[27] and indeed employed "Multinational Canada" in the subtitle of a critique of the Charlottetown Accord.[28] Our claimed multinational character, even if not yet formally recognized, has inserted itself into our language and therefore become one of the possible answers to the question —

(Beijing: Foreign Languages Press, 1995); J. Jenson, "Recognizing Difference: Distinct Societies, Citizenship Regimes and Partnership" in R. Gibbins & G. Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montreal: Institute for Research in Public Policy, 1998) 215 at 231–34; W. Kymlicka, "Multinational Federalism in Canada: Rethinking the Partnership," *ibid.*; C. McCall *et al.*, "Three Nations: Eleven of Canada's Leading Intellectuals declare their support for a Canada equitable from sea to sea" (1992) 70 Can. Forum 4; P. Resnick, "Canada: Three Sociological Nations?" (1992) 21 Can. Forum 27; P. Resnick, "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives" in F.L. Seidle, ed., *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options* (Montreal: Institute for Research on Public Policy, 1994) 71; P. Resnick, "The Crisis of Multinational Federations: Post-Charlottetown Reflections" (1994) 1 Rev. Const. Studies 189; R. Sigurdson, "Canada as a Multi-National Federation: Promises and Problems" (paper presented at "Canadian Democracy at Century's End" — the Atlantic Provinces Political Studies Association Conference, Mount Allison University, 15–17 October 1999).

[25] P. Chartrand, "Aboriginal Peoples in Canada: Aspirations for Distributive Justice as Distinct Peoples — An Interview with Paul Chartrand" in P. Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press New Zealand, 1999) 88 at 104, 90.

[26] Whitaker, *supra* note 12; D. Salee, "Identities in Conflict: the Aboriginal Question and the Politics of Recognition in Quebec" (1995) 18 Ethnic & Racial Stud. 277.

[27] See index references in A.C. Cairns, *Reconfigurations, supra* note 17 at 428.

[28] A.C. Cairns, "The Charlottetown Accord, Multinational Canada vs. Federalism" in Cairns, *Reconfigurations, supra* note 17 at 280.

"Who are we?" — vying with *Charter* Canadians, our federal nature, our bilingual character and our multicultural composition for our support.

It is time to step back and try to clarify the discussion now gathering momentum. Multinational Canada threatens to become a label that conceals the reality it is intended to describe. While the discourse that tries to make sense of a transitional era is almost inevitably chaotic and murky, especially when it is laced with advocacy, such confusion comes at a price. The remainder of this essay is an exploration, for the purpose of clarification, of the ambiguities and confusions that attend multinational discourse.

That discourse is a response to the remarkable diffusion of the "nation" label to more and more collective groupings. The two nations controversy of the 1960s[29] faded due to the inability of Canadians outside Québec to see themselves as a nation. It appears much less daunting now that we contemplate the spread of "nation" naming through Aboriginal Canada. This extraordinary diffusion of a high status label inevitably challenges the legitimacy of a constitutional order sensitive to different realities. The simultaneous existence of the Québec nation, and of many Aboriginal nations (crucial components in the identity of their members), along with the shadowy possibility of ROC acquiring a national sense of self are contemporary realities which challenge our capacity to think coherently of how or if these national identities and aspirations can be accommodated within a modified yet still viable version of our constitutional order. To say that Canadians are a multinational people is not a trivial matter. The nation-labelling and the realities to which it is a response reinforce each other and threaten to drive us to a destination we have not thought through.

III. REALITIES TO BE FACED

It is impossible to think clearly about or intelligently to advocate a multinational Canadian future if the following awkward facts are excluded from the discussion. Their recitation is only the beginning of the complexities that would attend travelling in that direction, but it is sufficient for my purposes.

How many nations? The common three-nations view of a future multinational Canada is seriously misleading for it gets the numbers wrong. Québec may be one nation (if we ignore the deep cleavages between Francophones and non-Francophones over desirable futures) and ROC may become one (although it may not survive the transition with its unity intact), but the inferentially

[29] Black, *supra* note 11 at 203–15.

hypothesized single Aboriginal nation in the three-nations perspective does not exist. At a minimum, the three categories of Aboriginal peoples identified in the *Constitution Act, 1982* — Indian, Inuit and Métis — can only be reduced to one nation with a common nationalism by a modern version of an imperialist sleight of hand that casually ignores distinctions that are vitally important to Aboriginal peoples.

Paul Chartrand, as noted above,[30] suggests between thirty-five to fifty Aboriginal nations. The RCAP proposes sixty to eighty Aboriginal nations in its vision of a refashioned multinational Canada. Even these numbers, however, underestimate the possibilities as by 1999 nearly 190 of 630 Indian bands had added "nation" to their official description, mostly in the last decade.[31] As the nation-naming process accelerated in the 1990s, explicit moves in a multinational direction encouraged more Indian bands to add nation to their title. Multinational Canada, therefore, could easily become home to several hundred nations. A three-nation image of who we are or might become is a simplification that impedes clarity of thought.

Differences in capacity: The national actors in a multinational Canada will have vastly different capacities for governing themselves. Numbers alone dictate this reality. An Aboriginal nation of several hundred members, or even the several thousand proposed by the RCAP, can only be coupled with the Québec nation — more than 1,000 times larger than even an optimistic assessment of the typical Aboriginal nation size — as belonging to an undifferentiated category "nation" if the analysis remains at a level of abstraction divorced from real governing possibilities. These are differences of kind. It is possible to read dozens of legal articles advocating maximum jurisdictional autonomy based on the inherent right of self-government that pay negligible attention to the very small size of populations which may exercise that right. Indian nations are *sui generis*.

Will Kymlicka's observation is pertinent. He defines a "societal culture [as] a territorially concentrated culture centred on a shared language that is used in a wide range of societal institutions, including schools, media, law, the economy,

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[30] *Supra* note 25 and accompanying text.

[31] Canada, *Schedule of Indian Bands, Reserves and Settlements Including Membership and Population Location and Acreage in Hectares, 1985, 1990, 1999* (Ottawa: Department of Indian Affairs and Northern Development, 1985, 1990, 1999), also cited in A.C. Cairns, "The End of Internal Empire: The Emerging Aboriginal Policy Agenda" (Governance in the 21st Century Symposium, Royal Society of Canada, November 1999) (Toronto: University of Toronto Press, 2000) 117 at 123.

and government." The maintenance of such a separate culture "in a modern state is an immensely ambitious and arduous project,"[32] a task that is a major challenge to Québec, let alone to a small Aboriginal nation of several thousand (or several hundred) people. The scattered Métis nation, whether restricted to the Métis of western Canada who trace their descent back to the first decades of the nineteenth century in what became Manitoba, or more broadly defined, or thought of as several nations, lack a land base with the exception of eight settlements in northern Alberta. While geographical fragmentation and the overall absence of a land base does not entirely preclude some self-governing possibilities, it is clearly limited.[33] The Métis nation (or nations) is not a nation like the others.

The Rest of Canada dilemma: The prospective members of a future multinational Canada are not equally enthusiastic about that future. ROC, or English Canada, or Anglophone Canada has almost no desire to wear new institutional clothing as a national partner to Québec and Aboriginal nations. It lacks nationalist self-consciousness. It is headless, voiceless, institutionless (on the whole), and has negligible ambition to constitute itself as a nation. Resnick, who despairingly wishes it were otherwise, observes English Canada as "a nation that dares not speak its name."[34] As long as Canada survives, the identity of ROC's prospective members attaches to that larger Canadian identity, now well into its second century.

Canada outside Québec is immersed in its allegiance to Canada as a whole. The civic nationalism and pan-Canadian identity that it defends includes all Canadians, including its Aboriginal and Québec nationalist challengers. Its sense of self is of a Canadian self. It is not struggling for more autonomy. It is not wounded by past humiliations. Its population, its infrastructure and its modernity suggest that like Québec, it has the capacity to go it alone. What it lacks is desire. Accordingly, its response to challenging internal nationalisms will be dictated by its own natural desire for the self-preservation of a strong Canadian component in a restructured Canada. While this does not make it immovable in the face of nationalist demands, it will seek to keep alive the Canadian and provincial dimensions among Aboriginal peoples, and the Canadian dimension

[32] Kymlicka, *supra* note 13 at 27, 31.

[33] See National Association of Friendship Centres and the Law Commission of Canada, *Urban Aboriginal Governance in Canada: Refashioning the Dialogue* (Ottawa: National Association of Friendship Centres and the Law Commission of Canada, 1999) for a helpful discussion of urban Aboriginal self-governance possibilities.

[34] P. Resnick, *Thinking English Canada* (Toronto: Stoddart, 1994) at 111.

in any asymmetrical recognition of Québec. ROC, wearing its Canadian hat, will not identify its bargaining partners as separate nations whose members are internal foreigners. They are fellow citizens. Potential concessions to nationalist pressures, therefore, are limited by the fact that each concession is experienced as a weakening of the Canadian community with which Canadians outside Québec identify. They are not experienced as ROC's liberation from a smothering Canadian embrace. Indeed, we would be much less likely to fall into confusion if we replaced ROC with the more accurate description of "Canadians outside Québec."

ROC might, of course, come to enjoy a new national existence it did not seek in a reconstituted multinational Canada dictated to it by necessity, but that does not mean that it now experiences existential angst from a lack of recognition. To assume that ROC is now a nation is a conjuring act. To take for granted that it can easily become so in a new constitutional dispensation is a risky hypothesis, not a well-grounded prediction. It is noteworthy that the claimed national existence of ROC or English Canada has more support among the nationalist politicians and intelligentsia in Québec — for whom its imputed existence supports the idea of sovereignty association or asymmetrical status by postulating two main actors — than it has among Canadians who live outside Québec. Jenson notes that by the 1990s in Québec a "clear representation of a Québec nation, facing an 'other'" had triumphed. Inchoate as 'English Canada' may have been in its own eyes, for Québec, with its dualistic reading of history, that other was clear.[35]

Heterogeneity and internal divisions: The nations on whose behalf the multinational project is being pursued are often ambivalent or internally divided on the desirability of the nationalist goal. This is dramatically so in Québec, where the conflict in the Francophone community between moderate and sovereigntist nationalists has shattered the social fabric of the province with Anglophones, Allophones and Aboriginal nations massively opposed to the sovereigntist version of a nationalist future. While these internal tensions would be lessened in a multinational Canada where Québec's jurisdiction falls short of independence, it is nevertheless true that Québec's enhanced status as a national partner in a multinational Canada is not being pursued on behalf of the non-Francophone communities. The nationalist project is driven by and for the Francophone majority. Even if the end goal is a Québec civic nation, such a goal is clearly in some tension with a multinational reconstitution of Canada to reflect ethno-nationalist identities. The goal of increasing the social and political

[35] *Supra* note 20 at 341.

distance between Québec and Canada outside Québec, if successfully achieved, will also increase that same distance between the Francophone majority and non-Francophones in Québec. It will be experienced as an unsought and undesired erosion of the Canadian identity of the overwhelming majority of non-Francophone Quebecers.

Indian first nations are also home to deep cleavages and fissures — partly the product of the new rules for the retention/inheritance of legal Indian status and the differential membership rules adopted by band council governments. As a result, Indian reserve communities are riven by cleavages between residents who have legal status and those who do not (often husband and wife), those who are members and those who are not (varying according to band membership rules as membership does not depend on legal status), and those who can pass legal status on to their children and those who cannot. The overall result is a catalogue of invidious distinctions which undermine community cohesion.[36]

Given these facts, some disagreement over the nature and desirability of the nationalist self-government goal is to be expected. In general, it appears that Aboriginal women are much less enamoured of the nationalist project than are men. The Native Women's Association of Canada (NWAC) insisted on the application of the Canadian *Charter* to First Nation governments. John Borrows, observing NWAC's passionate *Charter* support, was struck by "the tremendous lack of confidence that some First Nations women had in Aboriginal governments."[37] The constituency for Métis nationalism is difficult to pin down because with the exception of a few settlements in northern Alberta, the Métis lack a land base. Even RCAP, which was a powerful voice for Aboriginal nationalism, assumed that individual Métis would have the choice of whether to accept the jurisdiction of Métis locals. In general, the likely constitutional and institutional responses to Métis nationalism are unclear. The RCAP, after describing Métis National Council proposals for self-government, excused itself from pronouncing on their feasibility or viability.[38] Given the geographical scattering of the Métis people, their largely urban location, the fact that, unlike

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[36] S. Clatworthy & A.H. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report* (mimeo, a project undertaken for the Assembly of First Nations) (Perth, Ont.: Living Dimensions, 1992).

[37] J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" (1994) 43 U.N.B.L.J. 19 at 45.

[38] Cairns, *Citizens Plus, supra* note 7 at 137–38; Canada, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1–5 (Ottawa: Canada Communication Group Publishing, 1996) vol. 4 at 253.

status Indians, they do not have the sponsorship of a federal government department — and hence have lesser political visibility — they are extremely unlikely to gain the degree of nationalist separation from the majority society available to the Inuit and to land-based Indian communities. Accordingly, they will remain deeply embedded in and part of the non-Aboriginal society that surrounds them.

It is impossible to speak of internal divisions over the ROC nationalist project as there is no such project. However, ROC, redefined as an internal nation in a multinational Canada, would be subject to internal strains. It would be geographically split by the Québécois nation. It would almost certainly be internally federal, presumably along existing provincial lines. The Ontario problem — the massive numerical presence of Ontario, 50 per cent of the population of the new ROC nation — would raise exactly the same fears frequently voiced in discussion of the future of the Rest-of-Canada should Québec leave. ROC, therefore, may not be able to get its act together to survive as a nation in a multinational Canada, especially if the historic pan-Canadian dimension is reshaped as a flimsy umbrella. In sum, the proposed national units in a future multinational Canada will not bring a healthy solidarity to their new situation.

The diaspora problem: The project of a future multinational Canada is profoundly complicated by the populations outside their assumed nation base. The numbers are large. They will not be the beneficiaries of a Canada reconstituted to accommodate internal nations. Thus Anglophones and Allophones within Québec and Francophones outside Québec (Acadians excepted, see below) would experience a further marginalization as internal minorities should Canada move in a multinational direction. They will be distanced from the cultural and/or linguistic majority community of their own kind, now resident in a neighbouring internal nation. Of course, their rights might be protected by constitutional arrangements, but this would not mask the fact that a multinational Canada that territorializes and gives more power to internal nations was not sought for them, but more plausibly in spite of them. Already, while Canada remains nominally federal, the mother-tongue English population in Québec has declined precipitously from 801,000 (1976) to 622,000 (1996), an obvious reaction to its marginalization — compared to the past — by Francophone nationalism.[39]

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[39] G. Stevenson, *Community Besieged: The Anglophone Minority and the Politics of Quebec* (Montreal and Kingston: McGill-Queen's University Press, 1999) at 283.

Aboriginals in the city: Status Indians away from their homelands in urban centres can be thought of as a diaspora problem, but to simplify the discussion I have grouped them with other urban Aboriginals, Métis and non-status Indians who have no homeland to go to. Although some form of national recognition and even some limited self-governing possibilities might be available for urban Aboriginal peoples,[40] the urban, especially metropolitan setting is not friendly or sensitive to the multiplicity of Aboriginal people from different Aboriginal nations living there. Regina's Aboriginal population includes individuals "from twenty-seven reserves, eight Treaty areas, more than five First Nations, six provinces and two countries."[41] The RCAP report that more than anything else is a document of Aboriginal nationalism, admits that "nation" has limited resonance in urban environments. This is not a minor weakness in the RCAP's nation-driven analysis for it excludes half of the Aboriginal population. Further, although the data is susceptible to competing interpretations, the off-reserve intermarriage rate is high, estimated at 61.5 per cent as of 1992.[42] More generally, although the movement from city to reserve to city fluctuates, the overall Aboriginal urban population continues to grow. Further, the dramatic increase of Aboriginal students in post-secondary institutions will almost certainly add to urban Aboriginal numbers, and may generate numerous individual success stories that will suggest a different route to the future. If, therefore, the reconstitution of Canada in a multinational direction is thought of as a response to Aboriginal nationalism, its practical significance for the half of the Aboriginal population living in cities will be limited. For Aboriginal peoples the nationalist project is underinclusive.

Nation-to-nation confusion: From the RCAP's perspective, multinational Canada is to emerge as a result of nation-to-nation bargaining, a pervasive theme in Aboriginal discourse. Unfortunately, there is no non-Aboriginal nation with whom Aboriginal nations can bargain nation-to-nation. There is only Canada, of which they are already a part. Recurring two-row wampum portrayals of a

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[40] National Association of Friendship Centres and the Law Commission of Canada, *Urban Aboriginal Governance in Canada: Refashioning the Dialogue* (Ottawa: National Association of Friendship Centres and the Law Commission of Canada, 1999).

[41] Canada, *Demographics of Aboriginal People in Urban Areas in Relation to Self-Government: A Report Prepared for Policy and Strategic Direction, Department of Indian Affairs and Northern Development* by E. Peters (Ottawa: Indian and Northern Affairs Canada, 1994) at 6.

[42] Canada, *Revised Projection Scenarios Concerning the Population Implications of Section 6 of the Indian Act* by S. Clatworthy (Ottawa: Research and Analysis Directorate, Indian and Northern Affairs Canada, 1994) at 22.

desired future relationship between Aboriginal and non-Aboriginal peoples, which describe a coexistence of separate societies travelling in separate boats down the river of life to separate destinations,[43] postulate a separateness of discrete nations that is belied by the massive interdependence of Aboriginal and non-Aboriginal societies. Québec nationalists often mistakenly assume or provocatively assert that there is another national partner willing and able to come to the table to negotiate a reconstituted two-nations federalism. Robert Bourassa employed the language of nation-to-nation following the defeat of the Meech Lake Accord, indicating that in future he would bargain only with Ottawa, and not with the provinces.[44] Nation-to-nation, of course, was also implicit in the two-nations theories of the 1960s. However, there is no duly constituted ROC nation with an authority structure with which Québec could bargain. There is only the Canadian government acting on behalf of the Canadian nation, which includes Québec. "Nation-to-nation" falsely collapses Canada into ROC. It is fundamentally misleading for it postulates discrete actors bargaining the terms of their future interaction on the model of an international system. Nation-to-nation implies separate entities representing distinct non-overlapping communities that interact with each other as wholes. They are not and they do not.

The reality is that bargaining/negotiating renewed asymmetrical federal arrangements for nationalist purposes with the government of Québec, or a new treaty with British Columbia/Canada by an Indian nation in British Columbia is not nation-to-nation as this is commonly understood. When an Indian nation negotiates a new treaty, or Québec negotiates special manpower training arrangements, they are modifying their domestic arrangements within the federal system. A part is rearranging its relationship with the whole of which it continues to be a part. In other words, Québec is represented on both sides of the bargaining table, and the federal and provincial dimensions of the members of the Aboriginal nation, whose domestic relationship with the governments and societies of Canadian federalism is being redrawn, are represented by the federal and provincial governments. These are nation-to-nation relationships only if the normal meaning of words is ignored and if the Canadian nation is falsely defined as an alien other, rather than the overarching political community to which all belong. "Nation-to-nation" assumes an "as if" scenario. It assumes that the governments with which an Aboriginal nation or the Québec nation bargains

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[43] O. Mercredi & M.E. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking/Penguin, 1994) at 35.

[44] J.F. Lisee, *The Trickster: Robert Bourassa and Quebecers 1990–1992*, abr. and trans. R. Chodos, S. Horn & W. Taylor (Toronto: James Lorimer, 1994) at 11–18.

speak for a community to which they do not belong. For the Québec nation, for example, the logical premise is that the federal government represents only Canadians outside Québec, and that Quebecers are not part of the Canadian community for which Ottawa speaks. This is obviously fallacious but politically adroit in its attempt to delegitimate the Canadian connection in Québec. For Aboriginal peoples, not only is there no non-Aboriginal nation with which they can bargain but we lack the conceptual equivalent of the ROC label that has crept into our vocabulary with respect to Québec.

Multinational Canada and the decline of empathy: Moves in a multinational direction will reduce civic empathy across the boundaries of internal nations. The more we define ourselves domestically in national terms, the more we distance ourselves from those outside our nation. The language of nation tends to crowd out the language of citizenship and the moral bonds that the latter entails. Our feelings of responsibility for each other across internal national boundaries will contract as the citizen base for solidarity weakens. This may not be problematic for Québec nationalists wielding provincial-plus powers and happy and able to look after their own. However, to increase the distance between small, poor and weak Aboriginal nations and the large and powerful Québec and ROC nations in a hypothesized multinational Canada reduces the capacity of the former to make successful claims against the latter. If we share little in the way of citizenship, sharing itself will be in retreat, an unhappy consequence for small impoverished nations trying to catch up. With long effort in, for example, constructing the welfare state, Canadians have overcome many of the divisions of provincialism. Divisions between nations are much deeper; the will to overcome them will be much weaker; our success in doing so will be less frequent, more limited and more fragile. If our goal is to reduce our concern for each other, the strategy would be to fragment the Canadian "we" group into multiple national communities who will see strangers when they look outward. Since a prime purpose of defining a people as a nation is to increase social distance from those who are not members of the nation, no one should be surprised if the latter's sense of responsibility for the former plummets markedly. This will perhaps not be too serious if "multinational" is more rhetoric than prospective substance, although there is always the danger the rhetoric will be taken at face value.

Workability matters: The construction of workable institutional/constitutional arrangements for a multinational Canada that is to be "home" to nations ranging in size from Québec and ROC to a score, possibly hundreds, of small Aboriginal nations is not a task for the faint-hearted. Immense variations in the population of the nations in multinational Canada necessarily translate into equally immense

variations in capacity. The services that small Aboriginal nations will be able to provide for themselves will require extensive supplementation of programs and services from other governments. However, in a truly multinational Canada, the central government that survives will almost certainly be very weak and is unlikely to have much direct contact with the citizens of member nations. Both its legitimacy and its capacity will be drastically diminished as the pan-Canadian community becomes no more than a shadow of its former self. Possibly, however, as the shock of reality sets in, small Aboriginal nations will be heavily and willingly dependent for funds and programs on the two dominant nations of Québec and ROC, rather than on the now weakened centre. This presupposes, of course, that the non-Aboriginal national partners (Québec and ROC) will be open and accommodating, in other words not selfishly nationalist, which cannot be confidently assumed. If, however, Québec and ROC agree that the combination of wealth, size and moral obligations justifies providing extensive support for Aboriginal nations, multinational Canada then becomes a hierarchy of nations — two large ones and many small Aboriginal nations heavily dependent for their viability on their larger national neighbours. If this accommodation occurs, multinational Canada will not be the site for relations of equality among all the member nations, but one in which Aboriginal nations have significantly inferior jurisdictions and are heavily dependent for funds and programs on the two larger national communities. For Aboriginal nations, a multinational Canada will only work if they are not equal in terms of jurisdiction and autonomy to the larger national communities whose wholehearted support is essential if their nation self-government is to have any substance. By contrast, a fully articulated multinational Canada that worships at the shrine of internal nations and sets equality of nations as its guiding principle, will push us in the direction of seeing each other as strangers.

From the preceding perspective, multinational Canada, with its weakened bonds of solidarity, is morally inferior to contemporary Canada. The solidarity loss may be counterbalanced by the psychological and other benefits of greater autonomy, but decisive moves in that direction should not be undertaken without realizing that there is a trade-off. Further, in practical terms multinational Canada, no matter how it is constituted, will be hugely more complicated by virtue of the large number of nations that have to be accommodated, and by the fact that each Aboriginal nation will wield a unique set of powers. How this will all fit together in intergovernmental arrangements is a major problem. The accommodative capacity of executive federalism does not easily extend to the likely number of nations in a multinational Canada. Indeed, Gibbons and Ponting argue that "self-governing Aboriginal communities [could] fit into the existing network of intergovernmental relations [including executive federalism] ... only

with great difficulty." The number of governments would overwhelm the system, unless some process of aggregation occurred, and their limited executive capacity means they "would be playing with a very weak hand."[45]

The effective functioning of the overall constitutional order of a multinational Canada requires more attention than it has received. We should not only focus on nationalist escapes from an unwelcome togetherness, but also on the arrangements for the togetherness that remains to be fruitful (unless of course empathy and solidarity are not concerns). These arrangements would have to include a shared citizenship that is more than a formality, institutional arenas which transcend the nationalist pillars of the multinational order, and generate positive identification with the larger whole. In other words, multinational Canada will be a failure if it reduces central authority to a shell. Particularly for Aboriginal nations, multinational Canada will have a heavy price tag if there is no Canadian citizenship to ensure that their condition is of concern to non-Aboriginals. This means, paradoxically, that the survival of the Canadian nation and a meaningful Canadian citizenship is a prerequisite for a multinational Canada that is to be more than an aggregation of introspective nations. From this perspective it was irresponsible for the RCAP — which gave lip service to the concept of multinational Canada — to devote only eight out of more than 3,500 pages to how Aboriginal peoples would participate in the overall governance of the country through representation of Aboriginal nations in a third legislative chamber in Ottawa.[46] The RCAP's summary report of 149 pages devoted only two sentences to the subject.[47] If federalism, even multinational federalism, is about shared rule as well as self-rule, as the Commission admitted, it engaged in constitutional myopia when it proceeded with a massive report that implicitly assumed they could be severed from each other. By its own presentation, the RCAP report confirmed the dangers of introspective analysis triggered by nationalist self-absorption. If such inward-looking introspection was duplicated by the two large national partners in a future multinational Canada, concern for the small Aboriginal nations sharing space but little else would almost certainly be reduced. Solidarity or empathy which extends beyond the boundaries of internal nations goes against the grain of the major ordering principle —

[45] R. Gibbons & J.R. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Governance in Canada" in A.C. Cairns & C. Williams, eds., *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press, 1986) 171 at 210–11.

[46] *Supra* note 38, vol. 2(1) at 374–82.

[47] Canada, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) at 132.

"nation" — of a multinational polity. That "look after oneself" tendency can of course be checked by various devices, but the best check is to understand at the outset that to accord hegemony to the nation principle is to move us in the direction of a country of nationalist strangers.

The Acadian question: A significant move in a multinational direction may have a contagious impact on the Acadian population of New Brunswick, which constitutes two-fifths of the population by descent and one-third by language spoken. A Canada organized on multinational lines, driven largely by Québec's next-door nationalism would almost certainly have some destabilizing impact on French-English relations in New Brunswick.[48]

IV. THE SOURCES OF OUR CONFUSION

What I have tried to do thus far is to indicate several realities which, if not entirely overlooked, receive insufficient attention in discussion of our prospective multinational future. My purpose is not to deny the nationalisms that batter at our constitutional door, but to argue that a much greater clarity in the discussion is necessary if we are to separate the fanciful from the possibly attainable. Much of the literature of multinational Canada is characterized by an escape from complexity. Absolutely central to our confusion is the failure to make distinctions between various kinds of "nation" and "nationalism." For example, it is rare for writers to attend to the differences between Québec and Aboriginal nationalisms in terms of the self-governing possibilities realistically available to them, possibilities which are dictated in the first instance by population size. The coupling of Québec and Aboriginal nationalisms together in casual comparisons implies an implausible sameness to dissimilar phenomena. If only by implication, this leads to an exaggeration of the governing capacities of small Aboriginal nations. To put it differently, the use of the label "multinational Canada" either falsely assumes we know what we are talking about — that a nation is a nation is a nation — which in the Canadian case is untrue, or it is political camouflage behind some claim for recognition that is useful precisely because of its fuzzy ambiguity. While a degree of ambiguity is to be expected in the early stages of the appropriation of "nation" as a self-description by many Canadians, we have now reached the stage where the need for clarity is paramount. Various styles of thinking, which simply reflect our confusion, while further contributing to it, merit a brief discussion.

[48] R. Melanson, "Citizenship and Acadie: The Art of the Possible" in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993) 123.

1. Recurring references to a three-nation view of Canada oversimplify the Canadian situation. They overlook the fact that there are three constitutionally recognized Aboriginal peoples, — Indian, Inuit and Métis, which, following RCAP, should be divided into sixty to eighty Aboriginal nations. The tendency of Indian bands to add "nation" to their official titles — nearly 190 of 630 bands have done so[49] — is typically ignored.

2. The literature on multinational Canada as such is dwarfed by the focused literature directed to analysis/explanation/support of either Québec nationalism or one or more Aboriginal nationalisms. Occasionally, students of the Québec nationalist challenge add a short discussion of Aboriginal nations/nationalism as an afterthought. No organization speaks on behalf of all Aboriginal peoples. On-reserve status Indian, Inuit, Métis, Native women and the conglomerate urban Aboriginal population are all served by separate organizations.[50] Advocates line up behind each particular nationalist cause and usually show negligible concern for the encompassing multinational whole that is to accommodate it, or for the fact that other nations are playing the same game. Legal scholars push for the maximum constitutional space for the exercise of Aboriginal self-government but pay minimal attention to the larger question of what will hold us together, what will induce us to feel responsibility based on civic empathy for each other.[51] This one-sided perspective risks marginalizing the small, dependent nations it professes to be serving. The same introspective tendency is present in Québec, where Francophone nationalism in both its sovereigntist and distinct society/special status version gains strong support from the intellectual class.[52]

In general, the overarching political/constitutional concern of Québec and Aboriginal nationalisms, and of their intellectual supporters, is for the enhancement of their peoples with minimal concern for the other nations or parties with whom they profess to be reconstituting Canada, and with negligible attention paid to the general viability of the overall constitutional order that would follow the achievement of their goals. The 1991 Allaire report of the Québec Liberal party proposed a reconstituted federalism with such negligible

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[49] See 1999 figures, *supra* note 31.

[50] See *supra* notes 37, 38, 41 and accompanying text.

[51] Cairns, *Citizens Plus*, *supra* note 7 at 175–88.

[52] C. Bariteau *et al.*, *Référendum, 26 Octobre 1992: Les objections de 20 spécialistes aux offres Fédérale*, R. Vézina, ed., (Montréal: Les Éditions Saint-Martin, 1992); P. Bakuis *et al.*, *Répliques aux détracteurs de la souveraineté du Québec*, A.-G. Gagnon & F. Rocher, eds., (Montréal: VLB Éditeur, 1992).

appeal to the interests of Canadians outside Québec that it was difficult to believe it was a serious proposal.[53] Charles Taylor's proposal for the recognition of Québec's deep diversity with asymmetrical arrangements — which would leave the federal government with no emotional connection with Quebecers — raised the unanswered question of what legitimacy would sustain the federal government in future contests with the Québec government. The latter would have monopolistic access to the identities and passions of Quebecers.[54] The RCAP report, a document of Aboriginal nationalism, was almost indifferent to the integration requirements of the Canadian political system, had no more than a perfunctory interest in Canadian citizenship and displayed negligible concern for how the members of Aboriginal nations would relate to federal and provincial communities and their governments.[55] The main constitutional document of the Assembly of First Nations at the time of the Charlottetown Accord painted such an unflattering portrayal of non-Aboriginal Canada and such a utopian description of the Indian past that why such dissimilar peoples should coexist within one country had no answer except geography and accident.[56] In general, what kind of country Canada will be if the demands of internal nationalisms are met is left to the future and to others.

3. The complexity and diversity of Aboriginal nationalisms are almost consistently overlooked. Discussions purporting to discuss/analyze Aboriginal nations and nationalism focus overwhelmingly on the status-Indian population, especially those with a land base. As a result the complexities of Aboriginal nationalism are overlooked. For example, Kymlicka's recent discussion of Aboriginal nationalism focuses almost entirely on the land-based status Indian peoples, mentions the Inuit only in passing and overlooks the Métis.[57] Many commentators, in other words, have not caught up with the reality of section 35(2) of the *Constitution Act, 1982*, which stated that the "Aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada." Section

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[53] Parti Liberal du Québec, Comité Constitutionnel, *Un Québec Libre de ses Choix: Rapport du Comité Constitutionnel du Parti Libéral du Québec* (Montréal: Parti liberal du Québec, 1991) (Chair: J. Allaire).

[54] A.C. Cairns, book review of *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* by C. Taylor (1994) 27 Can. J. Pol. Sc. 155 at 156–57.

[55] Cairns, *Citizens Plus*, *supra* note 7 at 116–60.

[56] First Nations Circle on the Constitution, *To the Source: Commissioners' Report* (Ottawa: Assembly of First Nations, 1992). See Cairns, *supra* note 7 at 33–35 for details and an analysis.

[57] Kylmicka, *supra* note 13; A.C. Cairns, book review of *Finding our Way: Rethinking Ethnocultural Relations in Canada* by W. Kymlicka (1999) 32 Can. J. Pol. Sc. 369 at 370.

35(2), with its grouping of such dissimilar peoples together, is admittedly an invitation to confusion. Succumbing to the invitation nevertheless makes a negative contribution to the clarity of our thought.

4. The limited applicability of "nation" to the urban Aboriginal population receives minimal attention in the literature. "Nation" does not fit, or fits very poorly, and since "nation" is where the action is, Aboriginal peoples outside its embrace almost disappear from view. The blending of Aboriginal nationalism with the inherent right of self-government available to communities with a land base leads to a systematic overlooking of half of the Aboriginal people.

The major consequence of the preceding practices is that not only is the identity of the separate actors in multinational Canada shrouded in obscurity, but the differences among them are not systematically explored. Consequently, how the nationalist pieces will fit together is under-examined. Hence talk of multinational Canada is far removed from — or vague about — the reality it is supposedly describing. As a result, Charles Taylor's recent assertion of the "political necessity of a strong common identity for modern democratic states in terms of the requirement of forming a people, a deliberative unit,"[58] is overlooked.

V. WHY IS MULTINATIONAL DISCOURSE SO POORLY DEVELOPED?

The traditional Canadian discourse of federalism and the constitution contrasts sharply with the multinational discourse that challenges its hegemony. Federal-provincial discourse is rooted in the constitution itself. It is a conservative discourse policed and controlled by guardians, particularly by the courts, but also by scholars, journalistic commentators and rival governments. It is an inherited discourse that needs to be learned before it can be practised. Libraries of relevant literature are available for our guidance. The actors for the discourse of federalism are in place. They know their roles and they speak a common language.

Multinational discourse contrasts in almost every way with the preceding. It is not a hegemonic discourse and therefore lacks the pressures towards consistency that attach to governing paradigms. It is a recent discourse. The

[58] C. Taylor, "Democratic Exclusion (and its Remedies?)" in A.C. Cairns *et al.*, eds. *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives* (Montreal and Kingston: McGill-Queen's University Press, 1999) 265 at 271.

nationalist realities to which it responds and invigorates are new arrivals. Fifty years ago there were no self-defined Aboriginal nations that were publicly accepted as such. There was no umbrella concept of "Aboriginal Peoples of Canada." Inuit (then Eskimo) were far away and in the early stages of culture contact. The Métis were not consistently thought of as an indigenous people. The progressive end of the mainstream political spectrum at that time agreed that assimilation was the desired future for indigenous peoples.[59] Québec nationalism was conservative and non-statist. It sought principled adherence to the *Constitution Act, 1867*. ROC did not exist, even in imagination. Consequently, where we are now is not the culmination of a progressive unfolding, but the result of the dramatic emergence of newly energized peoples/nations for whom the past is seen as a burden. Consequently, much of our intellectual capital does not fit the new realities.

Multinational discourse is experimental and challenging, rather than conservative and stabilizing. There are no well-stocked libraries to consult, no guardians to control it and no agreed framework for discussion. It is not a coherent, orchestrated discourse in which the main actors speak a common language. A key word such as "nation" contrasts markedly with its federalist counterpart — "province"— which has an established, common meaning. Nation, however, is a label for such vastly different potentials that only a thin core of common, symbolic meaning attaches to its usage. Uniform jurisdictional treatment of such vastly different nations as Québec and an Aboriginal nation would be a constitutional absurdity. "Nation" tells us too little to serve as a unifying concept. When we examine its various contemporary expressions we cannot help but be struck by their lack of commonality. To apply "nation" indiscriminately, without discriminating adjectives, to such dissimilar phenomena as Québec (or its Francophone majority), ROC and a host of Aboriginal nations is to cultivate confusion. When nation lacks a consistent referent, to describe the present or a future Canada as multinational is no more than a very preliminary starting point towards self-understanding.

In the political arena, the emerging multinational discourse is largely an aggregation of claimants seeking nationalist objectives peculiar to themselves. This tendency is encouraged by our constitutional practice of responding separately to either Québec or Aboriginal demands — a consistent tendency from the Victoria Charter (1971), developed with no Aboriginal input, to the 1980–82 constitutional process, where Aboriginal organizations were denied full participation with governments but nevertheless made themselves heard by a

[59] Cairns, *Citizens Plus*, *supra* note 7 at 53–58.

variety of tactics and achieved surprising gains,[60] to the four Aboriginal constitutional conferences (1983–1987 — the Aboriginal round) and Meech Lake (1987–1990 — the Québec round). Only in the build-up to the 1992 Charlottetown constitutional package were Aboriginal and Québec representatives simultaneously present in the negotiation process, with Québec, however, arriving very late in the discussions. From a different perspective, both Québec referendums, 1980 and 1995 — intended instruments of nationalist mobilization — relegated Rest of Canada (with whom an association was to be pursued following a "yes" vote) to the audience, or treated those from outside Québec who sought to participate in the campaign as intruders. The Parti Québécois' intent was to weaken the Canadian presence in the campaigns by trying to restrict the contenders to competing provincial advocates of the best interests of Québec. The fact that three Aboriginal peoples — Cree, Inuit and Montagnais — launched their own counter-referendums prior to the official one in 1995, each of which resulted in a massive "no" vote,[61] simply confirms the fragmentation of contemporary multinational discourse, in this case within Québec. The three separate Aboriginal referendums were also, of course, symbolic efforts to underline that the Québec nation did not include and could not speak for their separate Aboriginal nations.

Multinational discourse is largely a discourse of particularisms. This is reinforced by the clustering of scholars behind either Aboriginal (disproportionately status Indian) or Québec nationalism. When the nationalisms clash, as they do in Québec, each sees the other as a threat. Further, in contrast to federalism, not all the key actors are in place. Two of the key players, Québec and Aboriginal nations, seek recognition; the third, ROC, seeks to avoid it, or more accurately, acting in its preferred Canadian capacity it resists the idea that ROC is an aspiring nation in the making. Accordingly, multinational discourse is not effectively joined. The most powerful actor is absent as it lacks national goals for itself.

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[60] D. Sanders, "The Indian Lobby" in K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 301.

[61] Inuit voted 95 per cent "no"; Cree, 96 per cent "no"; and the French-speaking Montagnais, 99 per cent "no." A.C. Cairns, "The Legacy of the Referendum: Who Are We Now?" (1996) 7:2 & 3 Const. Forum 35 at 36, 38–39, n. 3 for references. See also Library of Parliament, *Aboriginal Peoples and the 1995 Quebec Referendum: A Survey of the Issues* (background paper) by J. Wherrett (Ottawa: Library of Parliament, 1996) for a general discussion, including observations on the Cree and Inuit vote. Wherrett reports a 96 per cent "no" vote for the latter at 6–7.

In his book-length essay of the mid-1980s, *Canada and Quebec*, Daniel Latouche shrewdly observes that the basic impediment to the recognition of Québec as a distinct national actor, or to a two-founding-nations view of Canada, is the "inability of English Canada to contemplate its own existence as a national collectivity." He continues, "Since Durham, it has been clear that those familiarly known as English-Canadians have never been interested in building English Canada. Their only such frame of reverence has been an undifferentiated Canada." And "English-Canadian commentators ... are not unduly concerned about this lack of collective identity; for their identity exists at another level, at the level of Canada as a whole."[62] To discuss the future of Canada as a multinational polity in the absence of ROC (English Canada to Latouche) is similar to discussing the future of federalism in the absence of Ontario. "ROC," and "Canada Without Québec" (CWOQ) have a faintly derogatory air which testifies to the shadow life between existence and non-existence of Canadians outside Québec as a national community. For English Canada, a national self-image is not a gain but a diminution of the pan-Canadian nation to which it is attached. To see itself as a smaller national actor would be seen as a defeat, not a victory. Thus it has difficulty in seeing itself in other than federal or Canadian terms. In other words, the inability of English Canada/ROC to recognize itself as a nation is the central reason for Canada's difficulty in according asymmetrical national status to Québec within Canada. It is Canada that engages in constitutional bargaining with Québec, not English Canada or Rest of Canada. It is Canada that seeks new arrangements with Aboriginal nations, not non-Aboriginal Canada. Canada inevitably sees the future in terms of a surviving pan-Canadian community of Canadian citizens, possessed of a *Charter* and federally organized in provinces and territories. In other words, Canada does not see Québec or an Aboriginal nation as totally other, as a discrete, separate entity, but as part of itself. It could only see them as totally other if it saw itself as totally other, but it does not. These realities, which are in place now, set limits to the accommodation of internal nationalisms. The emergence of ROC as a separate national entity awaits the destruction of Canada by Québec's secession, or by a drastic asymmetrical recognition of Québec imposed by events.

Multinational Canada may not be an oxymoron in the future, but it has limited adequacy as a sociological description of where we now are. Consequently, there is no easy road to that future.

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[62] D. Latouche, *Canada and Quebec, Past and Future: An Essay*, vol. 70 of the Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986) at 74, 77, 79.

VI. CONCLUSION

The rhetoric that Canada is a multinational country, and must be reconstituted to accommodate that reality is, clearly, not hegemonic. At a minimum, however, it has acquired a certain credibility. It has become sufficiently common not to trigger the raising of an eyebrow when it is encountered. Widespread usage, however, is no guarantee that the implications of this new label, or the substance behind it, have been thought out. In many cases, "multinational" has become a slogan with a capacity to mystify that exceeds its capacity to inform.

My purpose in this paper has been straightforward. If multinational realities are going to be more prominent in our future, clarity about what "multinational" might mean is essential. I have tried to make a contribution to that necessary task. A fragmented, disjointed discourse dealing with the essentials of our future existence cries out for synthesis. The synthesizing task is not to eradicate the forces of nationalism — an impossible task — but to focus on the whole, to raise the questions that particularistic nationalist introspection overlooks. If the nationalist rhetoric that serves our separate selves undermines our feelings of responsibility for each other and leaves us with an unworkable political system, we will be added to the list of pyrrhic victories with which history is littered.

Given its status-raising capacity, "nation" is unlikely to disappear from our political vocabulary. We need, therefore, to discriminate among the various nations of Canada. It makes little sense to equate an Aboriginal nation of 5,000 to 7,000 with the Québec nation, with a population equal to 1,000 Aboriginal nations, and even less to extend the equation to the still smaller Aboriginal communities of several hundred people with nation in their title. The equation of Québec and ROC nationalism, as if they expressed similar desires of separate partners to escape from a loveless constitutional marriage, attributes a distinct identity and corporate existence to the latter that do not exist. Further, the French majority ethnic component of Québec nationalism is not mirrored by a functionally equivalent British or English majority-driven ROC nationalism. This might have been the case half a century ago. Ethnic demography outside Québec precludes that possibility now. Québec nationalism and any ROC nationalism will not be mirror images of each other.

Multinational Canada, therefore, is not the raw material for an easily reconstituted polity. Only a thin core of common meaning attaches to the undifferentiated application of "nation" to such different entities as Québec, an Aboriginal nation and ROC. The capacity of "nation" to encompass such diversity is perhaps a tribute to the elasticity of the term, but that elasticity means

that the phrase "multinational Canada" provides only minimal information on who and where we are and might become. The constitutional clothing capable of encompassing its dissimilarities would produce a vastly diverse set of jurisdictions. Québec, assuming it remains within Canada, might have only a loose and tenuous relationship with the Canadian state. The limited capacities of (nearly) all Aboriginal nations guarantees their heavy dependence on external governments for funding and for the provision of services. Unless they are linked by rights and obligations to larger, wealthier and more powerful governments — for which the obvious instrument is a common citizenship — they will be marginalized and impoverished. To ignore or minimize these realities is to be irresponsible. The tendency of much of the literature on the inherent right of self-government to pay little attention to these concerns is unfortunate.

Even if all these realities are attended to, a larger reality impedes the wholehearted definition of ourselves as a multinational people. Neither of the two challenging nationalisms — Québécois and Aboriginal — are inclusive, encompassing nationalisms, warmly embracing the totality of the peoples they profess or appear to speak for. Approximately half of the Aboriginal population lacks a land base and thus lacks the capacity to exercise any significant powers of self-government. Further, to speak of their future in national terms is, in most cases, a disservice. To ignore them because nation is ill fitted to their circumstances is to make nation an instrument of ostracism. The overwhelming majority of Anglophones, Allophones and Aboriginal nations in Québec oppose independence, and their acquiescence in asymmetrical status will weaken with every increase in asymmetry. Resistance is strongest for Aboriginal nations that confront Québec nationalism with their own nationalism. A multinational definition of Canada is seriously underinclusive.

The idea of a future multinational Canada to replace existing federal arrangements may not be a god that failed before it was tried out as an experiment. However, those who predict or support its coming need to attend to various realities and complexities that cannot be wished away.

Canada, Criminal Appeals and the Judicial Committee of the Privy Council in the 1880s

Jacqueline D. Krikorian*

In 1887 and 1888, the government of Canada enacted legislation to abolish criminal appeals to the Judicial Committee of the Privy Council. Exactly why the government took this action has been the subject of limited and somewhat contradictory analysis. An examination of the circumstances leading up to the passage of the legislation reveals that, after a series of problematic criminal cases, the federal government abolished such appeals for pragmatic reasons. A concern about the delay to the administration of justice was by far the most important consideration. Senior officials in both Ottawa and London believed that the enactment was necessary to improve the efficiency of the criminal justice process. Both the Colonial Office and Lord Chancellor's office accepted and supported the Canadian legislation in principle, although they were uncertain as to whether it accomplished its objective. To avoid the appearance of interfering in the Dominion's autonomy, they decided not to alert Canadian officials to their concerns about its validity.

En 1887 et 1888, le gouvernement du Canada a adopté une loi visant à abolir les appels en matière criminelle au Comité judiciaire du Conseil privé. La raison pour laquelle le gouvernement a pris cette mesure a fait l'objet d'une analyse limitée et quelque peu contradictoire. L'examen des circonstances qui ont mené à l'adoption de cette loi indique que suite à une série de causes criminelles à problèmes, le gouvernement fédéral a aboli ces appels pour des raisons pragmatiques. Le retard dans l'administration de la justice représentait de loin la considération la plus importante. Les hauts fonctionnaires, autant à Ottawa, qu'à Londres, estimaient qu'il était nécessaire de promulguer cette loi pour améliorer l'efficacité de l'administration de la justice pénale. L'office des colonies et le bureau du Grand chancelier ont tous deux accepté et appuyé en principe la loi canadienne, bien qu'ils n'étaient pas certains que cela permettrait de réaliser l'objectif. Afin d'éviter les apparences d'ingérence dans les affaires du Dominion, ils ont décidé de ne pas informer les hauts fonctionnaires canadiens de leurs inquiétudes quant à la validité de cette loi.

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I. INTRODUCTION

In 1887 and 1888, the Canadian government adopted legislation to abolish all criminal appeals to the Judicial Committee of the Privy Council. Although there is no general consensus on the reasons for the enactment, all agree on its fate. Thirty-eight years after its passage, the Judicial Committee held that this statutory provision was invalid in *Nadan* v. *The King*.[1]

The government of Canada's decision to end criminal appeals to the imperial tribunal during the late 1880s has been the subject of limited and somewhat contradictory analysis.[2] Peter Hogg, a distinguished constitutional expert, has suggested that the enactment was driven by a desire for greater Dominion autonomy:[3]

> The continuance of Privy Council appeals denied the Supreme Court a decisive voice in the development of Canadian law, including constitutional law. As the nation increased in maturity and shed other vestiges of colonial status, it became increasingly abhorrent that the rights of Canadian litigants, and the final say as to Canadian law, should be settled by a court in the United Kingdom. In 1888, the federal Parliament enacted an amendment to the Criminal Code which purported to abolish appeals to the Privy Council in criminal cases.

William S. Livingston, on the other hand, has argued that the 1888 legislation abolishing criminal appeals to the Judicial Committee was the result of widespread disillusionment with the quality of judicial decisions. This "unsatisfactory condition" was primarily attributed to the fact that the tribunal's members "were not sufficiently familiar with Canada's affairs to be able to

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1 *Nadan* v. *The King*, [1926] A.C. 482.

2 The lack of research on this matter stands in stark contrast to the thorough analyses of the Canadian government's 1875 statute to establish the Supreme Court of Canada and its provision limiting appeals to the imperial tribunal. See I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 24–37; D.M.L. Farr, *The Colonial Office and Canada, 1867–1887* (Toronto: University of Toronto Press, 1955) at 133–65; F. MacKinnon, "The Establishment of the Supreme Court of Canada" (1946) 27 Can. Hist. Rev. 258; D.B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester: Manchester University Press, 1987) at 27–53; and F.H. Underhill, "Edward Blake, the Supreme Court Act, and the Appeal to the Privy Council, 1875–6" (1938) 19 Can. Hist. Rev. 245. The correspondence exchanged between Edward Blake, Minister of Justice, and Lord Carnarvon, Secretary of State for the Colonies, regarding the establishment of the Supreme Court of Canada and appeals to the Judicial Committee is reprinted, in part, in L.A. Cannon, "Some Data Relating to the Appeal to the Privy Council" (1925) 3 Can. Bar Rev. 455.

3 P. Hogg, *Constitutional Law of Canada,* 3d ed. (Toronto: Carswell, 1992) at 203.

decide properly difficult questions involving its politics and constitution."[4] Still others have linked the abolition of such appeals to the 1885 Riel crisis and, in particular, to Riel's attempt to obtain special leave to appeal to the Judicial Committee.[5]

A closer examination of the context in which the government abolished criminal appeals to the Judicial Committee reveals, however, that neither nationalist sentiment nor a concern about the strength of the tribunal's decisions primarily determined the Parliament of Canada's actions.[6] And although the *Riel* case[7] no doubt influenced the government's behaviour, other cases played as significant a role — *R.* v. *Sproule*[8] was in fact the catalyst that led to the federal government's decision to end such appeals to the Judicial Committee.

The 1887 and 1888 federal legislation was adopted because of a series of problematic capital cases and a desire to improve the administration of justice within the country. The lengthy delays caused by these appeals were perceived to be paralysing the criminal justice system.[9] Support for this position is found in an examination of the behaviour and attitudes of senior officials not only in Ottawa but also in London. At the Colonial Office, it was accepted that the 1887 and 1888 enactments were necessary to avoid uncertainty in the administration of the criminal justice system. These British officials analyzed options available to them to ensure the statute's legality while, at the same time, trying to appear

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4 W.S. Livingston, "Abolition of Appeals from Canadian Courts to the Privy Council" (1950) 64 Harv. L. Rev. 104 at 105.

5 C.G. Pierson, *Canada and the Privy Council* (London: Stevens & Son, 1960) at 45; and P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 338.

6 This is not to suggest that there was not a concern about the quality of the Judicial Committee's decisions. Such attitudes did exist. See J.S.D. Thompson's 1886 comments about the tribunal in G. Stevenson, *Ex Uno Plures: Federal-Provincial Relations in Canada, 1867–1896* (Montreal & Kingston: McGill-Queen's University Press, 1993) at 297. See also E.R. Cameron, "Prerogative Right of Appeal" (1925) 3 Can. Bar Rev. 547. He argues at 551 that in 1880 "the Committee was composed of the weakest material to be found in that body during the last century."

7 *Riel* v. *The Queen* (1885), 10 A.C. 675.

8 *Robert E. Sproule* v. *The Queen* (1886), 1 B.C.R. (2d) 219.

9 Bushnell, *supra* note 2 at 35–36 and A.B. Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933) at 308 have come closest to this argument. Both have suggested that criminal appeals to the Judicial Committee were ended because of the impact of the *Riel* case and because of the government's concerns about the effect of prolonged delays on the judicial system. Neither, however, examined the matter in any detail.

not to be interfering in the Dominion's autonomy. Similarly, the Lord Chancellor understood and supported the Canadian government's rationale for the enactment. He was uncertain, however, about its validity.

II. THE JURISDICTION AND ROLE OF THE JUDICIAL COMMITTEE IN CRIMINAL MATTERS

Subjects residing in the colonies and dominions of the British Empire were entitled to seek special leave to appeal their legal disputes to "the foot of the throne."[10] A body comprised of the Sovereign's advisors, known as the King or Queen in Council, was responsible for hearing these matters.[11] Its authority was derived from the royal prerogative. The royal prerogative encompassed those powers that were both part of the common law[12] and were legally exercised by the Sovereign in the realm of either foreign or domestic affairs:[13]

> By the word prerogative we are to understand the character and power which the sovereign hath over and above all other persons, in right of his regal dignity; and which, though part of the common law of the country, is out of its ordinary course. This is expressed in its very name, for it signifies, in its etymology (from *præ* and *rogo*), something that is required or demanded before or in preference to all others...

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[10] Until the abolition of the Court of Star Chamber by statute in 1640, 16 Car. I. c. 10, this right of appeal to the Sovereign was also available to royal subjects in the United Kingdom. See Sir I. Jennings, *Constitutional Laws of the Commonwealth*, vol. 1 (Oxford: Clarendon Press, 1962) at 55; and N. Bentwich, *The Practice of the Privy Council in Judicial Matters*, 2d ed. (London: Sweet & Maxwell, 1926) at 2–4.

[11] "The Judicial Committee of the Privy Council" *Halsbury's Laws of England*, vol. 10, 4th ed. (London: Butterworths, 1975) at 357, para. 770.

[12] "The Royal Prerogative" *Halsbury's Laws of England*, vol. 8, 4th ed. (London: Butterworths, 1974) at 583–84, paras. 890–91; A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 12th ed. (London: Longman, 1997) at 272; and Hogg, *supra* note 3 at 14–15.

[13] H.J. Stephen, *New Commentaries on the Laws of England, Partly Founded on Blackstone*, vol. 2, 5th ed. (London: Butterworths, 1863) at 482. See also J. Chitty Jun, *A Treaty on the Law of the Prerogatives of the Crown* (London: Butterworth, 1820) at 4, citing 1 Bla. Com. 250. Constitutional expert A.V. Dicey defines the royal prerogative as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown," in his *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty *Classics*, 1982) at 282, reprint of the 8th ed. published by Macmillan in 1915.

One of the principle prerogatives of the Crown was the administration of law. The Sovereign, "as the fountain of justice and general conservator of the peace of the kingdom,"[14] distributed or "dispense[d] [justice] to whom it [was] *due*."[15]

With the passage of legislation in 1833 and 1844, the Parliament of Great Britain effectively transferred the appellate jurisdiction of the King or Queen in Council to a newly created statutory body entitled the Judicial Committee of the Privy Council.[16] The legislation affected the jurisdiction, composition and procedures of the new tribunal, but did not eliminate the royal prerogative itself:[17]

> The jurisdiction of the Privy Council to entertain appeals and other matters affecting the administration of justice in any part of Her Majesty's dominions is an aspect of the royal prerogative, being regulated by, but not grounded upon, the Judicial Committee Acts, the Orders in Council made under those Acts, and any local constitutions or legislation.

As a consequence of its unique structure, the tribunal itself could not render legal judgments *per se*, but only provide its opinion to the Sovereign. In practice, however, the Judicial Committee became the final appellate body for the Dominions and colonies of the Empire. The Crown's approval for its decisions was a mere formality. As Lord Haldane explained, the Sovereign would never reverse the tribunal's decisions because "according to constitutional convention it is unknown and unthinkable that his Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law."[18]

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14 Stephen, *ibid*. at 525, citing Bac. Ab. Prerog. D.; Com. Dig. Prerog. D. 28.

15 *Ibid*. at 525–26, citing Bract. 1. 3, tr. 1, c. 9, s. 3 [emphasis in original].

16 *An Act for the better Administration of Justice in His Majesty's Privy Council, 1833* (U.K.), 3 & 4 William IV, c. 41; and *An Act for amending an Act ... intituled An Act for the better Administration of Justice in His Majesty's Privy Council; and to extend its Jurisdiction and Powers, 1844* (U.K.), 7 & 8 Vict., c. 69.

17 "Commonwealth and Dependencies" *Halsbury's Laws of England,* vol. 6, 4th ed. (London: Butterworths, 1974) at 365, para. 819. See also the Judicial Committee's decision in *Attorney-General for Ontario et al.* v. *Attorney-General for Canada et al*., [1947] A.C. 127 at 145.

18 *British Coal Corporation et al.* v. *The King*, [1935] A.C. 500 at 511. Also see *Hull* v. *M'Kenna* (1923), [1926] I.R. 402 at 403 where Viscount Haldane stated that "[t]he Sovereign gives the judgment himself, and always acts upon the report which we [members of the Judicial Committee] make."

At the same time, neither the royal prerogative nor the 1833 and 1844 legislation ensured that the Judicial Committee would necessarily hear a criminal appeal from a dominion of the Empire. Despite the tribunal's broad appellate jurisdiction, there was no appeal as a right from a conviction. Anyone wishing to bring such a matter before the Judicial Committee first had to submit a petition for special leave to appeal. The appeal would only be heard if leave were granted by the tribunal — and these requests were rarely allowed. It was "the usual rule of this Committee not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of justice is alleged to have taken place"[19] or on "grounds of public policy."[20] It was believed that the inconvenience caused by such appeals significantly outweighed their value:[21]

> [T]he inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success.
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> ...
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> Interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its Officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare.[22]

In *Regina* v. *Eduljee Byramjee*, the Judicial Committee set out some of the "evil consequences" that might occur if appeals in criminal matters were heard by the tribunal. It was suggested that the delay caused by such an appeal would mean that "all benefit to be expected from a public example would be lost" and "the

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19 *Riel* v. *The Queen* (1885), 10 A.C. 675 at 677. See also *Arnold* v. *The King-Emperor,* [1914] A.C. 644; and the unreported judgment of the Judicial Committee in the petition for special leave to appeal in *Connor* v. *The Queen*, 18 July 1885, Record Group [hereinafter cited as RG] 13, vol. 1421, Capital Case file 192A–Connor J., National Archives of Canada [hereinater cited as NAC], Ottawa.

20 H. Reeves, Registrar of the Judicial Committee, "Lords Papers, 1872, vol. 9" cited in A. Power, Acting Minister of Justice, "Memorandum for the Minister of Justice Re. Connor" 14 July 1885, RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa. See also F. Safford & G. Wheeler, *The Practice of the Privy Council in Judicial Matters* (London: Sweet & Maxwell, 1901) at 755–68 and Bentwich, *supra* note 10 at 173–80 for a review of the case law pertaining to criminal appeals to the Judicial Committee.

21 *Falkland Islands Co*. v. *The Queen* (1863), 1 Moore's P.C. Cases (N.S.) 299 at 312.

22 *Regina* v. *Bertrand* (1867), L.R. 1 P.C. 520 at 530.

convicts themselves would be kept in a state of miserable suspense, to suffer in the end the same ignominious death to which they were sentenced."[23]

Criminal appeals from Canada to the Judicial Committee were also rarely heard. Not only would the Judicial Committee routinely refuse to allow such appeals, but it was the practice of the federal government to refuse to delay the implementation of a local court's sentence to allow sufficient time for those convicted to appeal to the imperial tribunal. In *Regina* v. *Whelan*,[24] 1869 and *Regina* v. *Smith*,[25] 1876, officials in Ottawa passed orders in council denying requests for respites to delay execution sentences. The government was aware that in taking such action the condemned men would probably not have an adequate opportunity to seek leave to appeal to London.[26] Similarly, in "the case of Phipps, held for extradition to the United States for forgery, an application to stay the extradition in order to enable the prisoner to prosecute an appeal to the Privy Council was refused."[27]

The Canadian government's policy to refuse to grant respites in order to allow appeals to the Judicial Committee was based on two grounds. First, it was

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23 *Regina* v. *Eduljee Byramjee* (1846), 5 Moore's P.C. Cases 276 at 290–91; and *The Queen* v. *Joykissen Mookerjee* (1862), 1 Moore's P.C. Cases (N.S.) 272 at 297 where it was held that the consequences of granting criminal appeals were "so entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment."

24 *Regina* v. *Whelan* (1869), 28 U.C.Q.B. 108 (Court of Error and Appeal). Whelan was sentenced to death for the murder of the Honourable Thomas D'Arcy McGee.

25 *Regina* v. *William Henry Smith* (1876), 38 U.C.Q.B. 218.

26 In the Whelan case, the order in council was dated 8 February 1869, RG 13, vol. 1407, Capital Case file 19A–Whelan P.J., NAC, Ottawa. In the Smith case, the order in council was dated 15 April 1876, no. 1235–76, RG 13, vol. 1414, Capital Case file 107A–Smith W.H., NAC, Ottawa. Smith however, was granted clemency at a later date.

27 A. Power, Acting Minister of Justice, "Memorandum for the Minister of Justice Re. Connor" 14 July 1885, RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa. There appears to be little information on the *Phipps* matter, although a similar reference to the case is found in the telegram from G.W. Burbidge, Deputy of Minister of Justice, to A. Power (15 July 1888) RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa, and in a memorandum from Sir Alexander Campbell, Minister of Justice, to Lord Lansdowne, Governor General, entitled "Memorandum on the case of John Connor" Ottawa, 18 July 1885, enclosed with a letter from the Marquis of Lansdowne, Governor General, Ottawa, to Colonel Stanley, Secretary of State for the Colonies (20 July 1885) "Appeals from Canada in Criminal Cases" Lord Chancellor's Office records [hereinafter cited as LCO] 1/2, Public Records Office [hereinafter cited as PRO] (Kew), London.

believed that such a practice would impair the effective operation of the legal system:[28]

> If such applications were entertained they would inevitably become much more numerous than they have been in the past, thereby obstructing and arresting the whole course of the Administration of Justice. Everyone convicted of murder would seek by means of such respite to delay the execution of the sentence of the Law.

A second reason the Canadian government refused to delay sentences in order for appeals to be made to London was because "it would be to give Canadian felons a privilege which the law does not allow to convicts in Great Britain."[29]

Imperial authorities appeared to give tacit approval to the Canadian government's approach to these requests. Lord Carnarvon, the Secretary of State for the Colonies, did not appear to believe that officials in Ottawa were required to delay the execution of a criminal sentence to allow for an appeal to be made to the Judicial Committee. In the *Smith* case, the British minister told the Governor General, the Earl of Dufferin, that his Canadian "ministers will advise [him] whether a respite should be granted pending hearing of this application."[30]

By temporarily declining to postpone the court orders regarding the convicted men's sentences and extradition, the federal government attempted to deny Smith, Whelan and Phipps the opportunity to seek leave to appeal their convictions.[31] This Canadian approach to limiting appeals to the Judicial Committee was effective because of the relatively few appeals to the Judicial Committee in criminal cases, the uncontroversial nature of the cases where leave was sought, and the general policy of the tribunal not to hear such appeals. However, beginning in 1885, this strategy proved much less successful.

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28 Memorandum from Sir Alexander Campbell, Minister of Justice, to Lord Lansdowne, Governor General, entitled "Memorandum on the case of John Connor" Ottawa, 18 July 1885, enclosed with a letter from the Marquis of Lansdowne, Governor General, Ottawa, to Colonel Stanley, Secretary of State for the Colonies (20 July 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

29 *Ibid*.

30 Cablegram from Lord Carnarvon, Secretary of State for the Colonies, to the Governor General, the Earl of Dufferin (22 April 1876) RG 13, vol. 1414, Capital Case file 107A–Smith W.H., NAC, Ottawa.

31 Despite the government's actions in the *Smith* case, *supra* note 25, David Glass, counsel for Smith, was able to have the petition for appeal heard by the Judicial Committee. Leave to appeal, however, was denied. See telegram from G.W. Burbidge, Deputy Minister of Justice, to A. Power (15 July 1888) RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa.

III. THE *CONNOR*, *RIEL* AND *SPROULE* CASES

In 1885 and 1886, officials in Ottawa were faced with three criminal appeals to the Judicial Committee that created uncertainty and delay in the administration of justice, aroused the interest of the Colonial Office and, to varying degrees, captured the attention of the Canadian public. Consequently, it proved to be increasingly difficult for the federal government simply to pass an order in council to deny a stay in an execution when an individual sought leave to appeal to the Judicial Committee.

In the first of these cases, *Queen* v. *Connor*,[32] the accused was tried for murder according to the requirements set out in the *North West Territories Act, 1880*.[33] On 2 May 1885, Connor was found guilty and sentenced to death. The decision was confirmed on appeal to the Manitoba Court of Queen's Bench. However, on 10 July 1885, only one week before Connor's sentence was to be carried out, his counsel wrote to the Governor General, Lord Lansdowne, requesting a respite to ensure sufficient time for an application to appeal to the Judicial Committee to reach London.[34] The appeal was based in part on the ground that the trial was unlawful because only six jurors heard the case instead of the traditional twelve jurors used outside of the jurisdiction of the *North West Territories Act*.[35]

The federal government's immediate response was to order a review of the law regarding criminal appeals to the Judicial Committee. In a confidential memorandum for the Minister of Justice dated 14 July 1885, A. Power argued that an appeal in a criminal matter from the North West Territories to the Judicial Committee legally existed by virtue of the fact that the royal prerogative had not been parted with "by statute or otherwise." He advised the Minister

32 *Queen* v. *Connor* (1885), 2 Man. R. 235 (Man. Q.B.); RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa, and "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London. In some documents Connor is spelled O'Connor.

33 *The North-West Territories Act, 1880*, S.C. 1880, c. 25.

34 Telegram from T.C. Johnston, Counsel for Connor, to the Secretary of State (10 July 1885) RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa.

35 Document listing grounds for appeal, entitled "Easter Term 48th Victoria" in *ibid*.

however, that "the question of respiting to permit an appeal [by Connor to the Judicial Committee] wd [*sic*] appear to be one of policy."[36]

G.W. Burbidge, Deputy Minister of Justice, noted his opposition to allowing criminal appeals on policy grounds. Burbidge argued that "if appeals [to the] Privy Council in Criminal Cases were entertained the administration of Justice would be rendered exceeding slow and difficult in Canada." He cited the *Whelan*, *Smith* and *Phipps* cases as precedents for refusing to postpone Connor's execution.[37] Not surprisingly therefore, the government issued an order in council denying a stay in Connor's execution.[38] Connor was executed on 17 July 1885.[39]

In response to a telegram from the Secretary of State for the Colonies inquiring about the *Connor* matter, the Governor General justified the government's decision to refuse the accused a respite on two grounds. First, he explained that the government was only following earlier precedents. Secondly, he noted that "the jurisdiction of the Canadian Courts in Criminal matters is exclusive and final" as the Crown already had "parted with its Prerogative of reconsidering criminal cases."[40] This position was based on a legal opinion provided to him by the Minister of Justice, Sir Alexander Campbell, which stated that the imperial government had invested the royal prerogative pertaining to criminal appeals in the Canadian Governor General in Council when it enacted the *British North America Act, 1867*.[41] As the statute had "expressly and directly delegated" to the Parliament of Canada the power to legislate in the areas of peace, order and good government, and criminal law and procedure, the Canadian government had the competence to determine whether the Judicial Committee could hear Canadian criminal appeals.[42]

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36 A. Power, Acting Minister of Justice, "Memorandum for the Minister of Justice Re. Connor" (14 July 1885) in *ibid*.

37 Telegram from G.W. Burbidge, Deputy Minister of Justice, to A. Power (15 July 1888) in *ibid*.

38 Order in council, (16 July 1885) in *ibid*.

39 Telegram to the Secretary of State from Samuel E. St. Chapleau, Sheriff N.W.T. (17 July 1885) in *ibid*.

40 Letter from the Marquis of Lansdowne, Governor General, Ottawa, to Colonel Stanley, Secretary of State for the Colonies (20 July 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

41 *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

42 Memorandum from Sir Alexander Campbell, Minister of Justice, to Lord Lansdowne, Governor General, entitled "Memorandum on the case of John Connor" Ottawa (18 July 1885) enclosed with a letter from the Marquis of Lansdowne, Governor General, Ottawa,

Earlier cases decided by the Judicial Committee were cited in Campbell's memorandum as authority for this position:[43]

> In the case of the *Queen* v. *Eduljee Byramjee* ... it was held by the Judicial Committee of the Privy Council that there was no power reserved to the Crown by the Bombay Charter to allow appeals in criminal cases, such appeals being confined to civil cases only. It was held that the Charter, having been granted by the Crown by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act even though the prerogative of the Crown were limited by such construction, and that the Supreme Court alone had full and absolute power to allow or deny permission to appeal in Criminal cases.

It further was noted that Dr. Lushington, speaking for the tribunal in *Eduljee Byramjee*, had stated that "throughout the Dominions of the Crown ... no right of appeal in felonies ever existed."[44]

Campbell's memorandum also cited *Cuvillier* v. *Aylwin,* where the Judicial Committee had held that colonial legislation limiting the right of appeal to disputes involving not less than £500 sterling was acceptable as "the King, acting with the other branches of the Legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights."[45]

In his letter to the Secretary of State for the Colonies, the Governor General noted that "even if there were any doubt as to the extent to which [the Crown has parted with its prerogative], it was in the present case entirely for the Governor General in Council to decide as a question of public expediency ... The most disastrous results would follow were it once to be admitted that in every Criminal case the usual course of the law might be interfered with in order to facilitate such an application."[46] The Governor General argued that "considering the question as one of policy and bearing in mind the effects upon the administration of the Criminal law likely to follow" if such a precedent were established, the Canadian government "had no course open to it but that which was adopted."[47]

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to Colonel Stanley, Secretary of State for the Colonies (20 July 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

43 *Ibid.*, citing *Regina* v. *Eduljee Byramjee* (1846), 5 Moore's P.C. Cases 276.

44 *Ibid.*

45 *Ibid.*, citing *Cuvillier* v. *Aylwin* (1832), 2 Knapp's P.C. Cases 72 at 78.

46 Letter from the Marquis of Lansdowne, Governor General, Ottawa, to the Right Honourable Colonel Stanley, Secretary of State for the Colonies (20 July 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

47 *Ibid*.

One day after Connor's execution was carried out, the Judicial Committee met to consider his application for leave to appeal. The unreported opinion indicates that the members of the tribunal thought it likely that Connor's death sentence already had taken place and decided that it would not "be expedient to have a discussion until this fact be ascertained." However, they found "that the reasons disclosed by [the petition for leave to appeal] are not *prima facie* such as would induce them to grant leave to appeal." The tribunal also confirmed that the "rule of the Board is not to entertain any appeal in criminal cases unless in very exceptional circumstances."[48] Accordingly, Campbell advised the Governor General that in the *Connor* matter, Lord Watson found that "no case had been made out — so that the absence of a grand jury and the trial by less than 12, are pronounced not to be illegal."[49]

In light of the uncertainty surrounding the issue of criminal appeals, British officials decided to examine the legal authority for the Judicial Committee to hear such matters from Canada. Although the Lord Chancellor, Lord Halsbury, believed that there was "no reason to doubt that the decision arrived at [by the Canadian government in the *Connor* case] was correct," he thought it was advisable that the imperial Attorney General and Solicitor General be consulted.[50] Therefore, Halsbury, in conjunction with the Lord President of the Privy Council, Viscount Cranbrooke, requested the Chief Law Officers to advise Her Majesty's Government whether the Crown had parted with the royal prerogative in Canadian criminal cases.[51]

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48 Judgment of the Judicial Committee in the Petition for Special leave to appeal of *Connor* v. *The Queen* (18 July 1885) RG 13, vol. 1421, Capital Case file 192A–Connor J., NAC, Ottawa.

49 This decision is referred to in a letter from Sir Alexander Campbell, Minister of Justice, to Lord Lansdowne, Governor General (10 August 1885) RG 27 I B6, reel A–626, NAC, Ottawa.

50 Letter from Kenneth Muir Mackenzie, Secretary to the Lord Chancellor, to the Clerk of the Privy Council, Whitehall (3 September 1885) entitled "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

51 *Ibid*.; also see letter from Herbert Manson Swift, Senior Clerk of the Privy Council, to the Secretary to the Lord Chancellor (28 September 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

On 24 September 1885, Sir Richard Webster,[52] the Attorney General, and Sir John E. Gorst, the Solicitor General, issued their report expressing the opinion that the Crown had not parted with its prerogative and Canadian appeals in criminal matters could continue to be entertained by the tribunal. However, it was found that the Canadian government had the legislative competence to bring an end to this practice:[53]

> That by the *British North American Act, 1867* (30 Vic. cap 3) the Canadian Parliament has power to legislate so as to limit, or take away, such a right of appeal; at present however no legislation to that effect has taken place and in our opinion the creation by Statute of the power to legislate cannot be regarded as equivalent to the exercise of such power so as of itself to abolish or limit the right of appeal.

The Lord Chancellor did not, however, comment on the Law Officers' Report. An official in Halsbury's office, most likely the Secretary, noted that he "wrote privately [to] Peel on 7 October [1885] explaining that [the] Lord Chancellor could not give an opinion at present as he had consulted [on the matter] in the Judicial Committee."[54] The Lord Chancellor also may have been reluctant to discuss the issue of Canadian criminal appeals with his government colleagues because a similar Canadian case was before the Judicial Committee later that month, *Riel* v. *The Queen*.[55]

On 20 to 25 July 1885, Louis Riel was tried and convicted for the crime of treason and sentenced to death. The court's decision was confirmed on appeal to the Manitoba Court of Queen's Bench. The decision immediately became a potent national issue and was intensely debated across Canada. It was "the subject of party, religious, and national feeling," with French Canadians supporting Riel and English Canadians calling for his death.[56] In this context,

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[52] Webster's legal talents were not held in high esteem by his peers, see H.W.C. Davis & J.R.H. Weaver, eds., *Dictionary of National Biography, 1912–1921* (Oxford: Oxford University Press, 1961) *s.v.* "Webster, Sir Richard" at 562.

[53] Report by Sir Richard E. Webster, MP, Attorney General, and Sir John Eldon Gorst, MP, Solicitor General, Royal Courts of Justice, to Chas. Lennox Peel, Esquire, Clerk of the Privy Council, (also sent on to the Lord Chancellor) (24 September 1885) "Appeals from Canada in Criminal Cases" in LCO 1/2, PRO (Kew), London.

[54] Written on the back of a letter addressed to the Secretary to the Lord Chancellor, from Herbert Manson Swift, Senior Clerk of the Privy Council (28 September 1885) "Appeals from Canada in Criminal Cases" LCO 1/2, PRO (Kew), London.

[55] *Supra* note 7.

[56] Sir A. Campbell, Minister of Justice, "Memorandum Respecting the Case of the *Queen* v. *Riel*, prepared at the request of the Committee of the Privy Council" reprinted in *Legal News*, vol. 8 (12 December 1885) at 397. There are several excellent studies that examine

therefore, it was not surprising that Riel's counsel was able to obtain a respite in order to have sufficient time to seek leave to appeal to the Judicial Committee. The Minister of Justice, with the concurrence of the Governor General,[57] made it clear "that if Riel applies to be heard by the Judicial Committee, and a respite should become [necessary] to enable him to do so, it should as a matter of policy be granted in this action." At the same time, however, the Minister believed that it was doubtful that Riel would be successful because of the tribunal's earlier decision in *Connor*.[58]

By order in council dated 25 September 1885, Riel's death sentence was postponed to facilitate an opportunity to seek leave to appeal. It stated that any "such steps may be adopted by the Governor General in Council as will allow [Riel] the necessary time to procure an appeal to the Queen's Most Excellent Majesty in Council ..." At the same time, the government emphasized that time was of the essence, and any delay in such a hearing was inadvisable:[59]

> The Minister of Justice ... recommends that Your Excellency be moved to communicate with [the] Right Honorable the Principal Secretary of State for the Colonies with a view if possible, to secure an early meeting of the Judicial Committee of the Privy Council in order that the question as to whether leave to appeal in this matter will be granted or not, shall be determined at the earliest possible time.

Officials in London respected the request made by the Canadian government and Riel's petition seeking leave to appeal was heard by the Judicial Committee on 21 and 22 October 1885.

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the Riel crisis in Canada. These include O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2d ed. (Toronto: Oxford University Press, 1997); T. Flanigan, *Louis 'David' Riel: Prophet of the New World*, rev. ed. (Toronto: University of Toronto Press, 1996); T. Flanigan, *Riel and the Rebellion, 1885 Reconsidered*, 2d ed. (Toronto: University of Toronto Press, 2000); J.W. Friesen, *The Riel/Real Story: An Interpretive History of the Metis of Canada*, 2d ed. (Ottawa: Borealis, 1996); D. Morton, *The Last Drum* (Toronto: Hakkart, 1972); and D. Morton & R.H. Roy, eds., *Telegrams of the North-West Campaign* (Toronto: The Champlain Society, 1972).

[57] Campbell, *ibid*. at 397.

[58] Letter from Sir Alexander Campbell, Minister of Justice, to Lord Lansdowne, Governor General (10 August 1885) RG 27 I B6, reel A–626, NAC, Ottawa. Note, however, that Riel did not base his appeal to the Judicial Committee on the same grounds that O'Connor used in his appeal. See Riel's petition for appeal to the Judicial Committee (14 September 1885) in RG 13, vol. 1421, file 202A, part 1, NAC, Ottawa.

[59] Order in council no. 1743 (25 September 1885) RG 13, vol. 1421, Capital Case file 202A–Riel, L., part 1, NAC, Ottawa.

During the proceedings, discussion between the bench and counsel provides some insight into the position of each of the law Lords on the issue of whether the imperial government had parted with the prerogative in Canadian criminal appeals. Lord Halsbury appeared not to have ruled out this possibility:[60]

> The Lord Chancellor said the only question was whether Her Majesty had parted with the [prerogative] power. She might have parted with it by giving an absolute and final court, and therefore delegating her power to that court, or by express words have reserved the right to herself, as in the case of civil cases from Canada.

Lord Fitzgerald indicated that he believed that the prerogative still existed. However, one of his comments suggests that he might accept a statute expressly abolishing appeals:[61]

> Lord Fitzgerald pointed out that there was nothing in the [North West Territories] Act of 1880 making the decision of the Court of Queen's Bench of Manitoba final. There was only a limited appeal to that court, and therefore the inference from the act rather was that the larger right of appeal to the Queen in Council had not been abandoned.

Lords Monkswell and Hobhouse held the view that their committee did have the jurisdiction to entertain criminal appeals, although they acknowledged that this was rarely done.[62]

In light of what appears to be a diverse range of views among the members of the Judicial Committee, it was not surprising that the opinion released by the tribunal in the *Riel* matter stated that it was not ready "to affirm nor to deny" whether the prerogative to grant an appeal still existed.[63] Nor was Sir Richard Webster, the Attorney General for the imperial government acting on behalf of the government of Canada, able to address this issue before the tribunal because the Crown was not called upon to make its case.[64] Instead, the members of the Judicial Committee held that Riel's petition to appeal could be denied without

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60 "The Riel Case, a report of the proceedings of the Riel hearing for special leave to appeal at the Judicial Committee of the Privy Council" reprinted in *Legal News*, vol. 8 (7 November 1885) at 358.

61 *Ibid*.

62 *Ibid*. at 357.

63 *Supra* note 7 at 677.

64 Letter from Justice Burbidge to J.S.D. Thompson, Minister of Justice (18 May 1888) RG 13, Series B–2, Central Registry Files, vol. 2253, file 56/1888, NAC, Ottawa; Robert Sedgewick replaces Burbidge as Deputy Minister of Justice in October 1887 when Burbidge is appointed as a Judge to the Exchequer Court of Canada.

a decision on the matter of whether the Crown had parted with the prerogative to hear appeals in criminal matters.

Burbidge was present at Riel's 1885 application for leave to appeal at the Judicial Committee in London. In an 1888 letter to J.S.D. Thompson, Minister of Justice, Burbidge reviews the instructions he received for the *Riel* hearing from the Canadian government on the issue of criminal appeals to the Judicial Committee:[65]

> When in 1885 I went to London to be present at the hearing before Her Majesty's Privy Council of Riel v Regina, it was part of my instructions from the Minister of Justice to ask the Crown Officers of England to present to their Lordships the view that under the then existing legislation, there was no appeal to them in a criminal case arising in Canada.

Burbidge advised Thompson that Webster, the English Attorney General, had agreed to state Canada's case that there were no appeals in criminal matters to the Judicial Committee. However, Burbidge noted that the Attorney General "did not consider it very important to get a decision on the legislation then existing, as he had no doubt that the Parliament of Canada could, by a properly drawn act, take away the right of appeal in such cases." Webster also had stated that "he had so advised Her Majesty's Government" on this position, alluding to his earlier report to the Lord Chancellor.[66]

Burbidge also explained to Thompson that Webster's junior counsel, Mr. Daukwert, had advised him that any Canadian legislation abolishing criminal appeals to the Judicial Committee had to be carefully drafted:[67]

> [I]n passing an Act of the kind, care should be taken to make it clear that the Appeal was taken away notwithstanding any royal prerogatives, or the saving clause in respect thereof in the Dominion Interpretation Act.

If such conditions were not met, Daukwert contended that those convicted under the *Criminal Code* would be able to continue to appeal to the English tribunal.[68]

For approximately one year after the Riel hearing, the issue of criminal appeals to the Judicial Committee lay dormant. Then, on 20 September 1886, the government was requested once again, to direct a respite to ensure that an

[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*

application to appeal to the Judicial Committee could reach London by mail.[69] Robert Evan Sproule, an American citizen residing in British Columbia, was tried and convicted of murdering Thomas Hammill and sentenced to death.[70] Sproule's trial received significant publicity on the west coast of Canada and the United States.[71] Because the convicted man was an American citizen, the United States' Secretary of State, T.F. Bayard, became involved. He lobbied the British representative in Washington, Sir Lionel S. Sackville West, and the Under-Secretary of State of the British Foreign Office, the Earl of Iddesleigh, to pressure officials in Ottawa to grant Sproule a respite to allow him time to appeal to the Judicial Committee.[72] Bayard's strategy was successful. Sackville West contacted the Canadian Government on 23 September 1886 and two days later Lord Stanhope, the Secretary of State for the Colonies, sent a telegram to Dominion officials:[73]

> The following telegram has been received from the Government of the United States to United States Minister, Telegram begins, Robert E. Sproule a citizen of the United States of America condemned to be hanged on the 1st of October at Victoria British Columbia convicted on circumstantial evidence. Jury in doubt recommended to mercy. Polling of Jury refused-... the facts of the case discovered subsequently indicate innocence, great irregularity of proceedings, alleged and widespread belief the Privy Council would reverse judgment, applying for respite until appeal can be had. Will send full statement by mail Bayard-Telegram ends. Her Majesty's Government hope that request of United States Government will receive all proper attention.

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69 Letter from Theodore Davie, counsel for Robert Evan Sproule, to J.S.D. Thompson, Minister of Justice (20 September 1986) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa.

70 *Supra* note 8; for a detailed review of the events surrounding the *Sproule* case, see W.F. Bowker, "The Sproule Case: Bloodshed at Kootenay Lake, 1885" in L.A. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 233.

71 See *ibid.*

72 Letter from Sir Lionel S. Sackville West, the British representative in Washington, to the Earl of Iddesleigh, Under-Secretary of State, British Foreign Office, describing a meeting between Sackville West and T.F. Bayard, American Secretary of State (25 September 1886). Also see telegram from Bayard to the American Legation in London for the attention of the British Foreign Office. Both documents in (25 September 1886) CO 42/788, PRO (Kew), London.

73 Cablegram from Lord Stanhope, the Secretary of State for the Colonies, London, to A. Russell, the Administrator for the Government of Canada, Ottawa (25 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa and in CO 42/788, PRO (Kew), London.

Officials in Ottawa, however, rejected any intervention by either the British or Americans. On 24 September 1886, A. Russell, the Administrator for the Government of Canada, informed Sackville West that he was directed to state that the "Government will not respite."[74] And three days later, Burbidge responded to Stanhope's telegram, stating that there were no grounds for a further respite and that the matter had received the attention of a number of courts in Canada. As ordered by the court, Sproule's execution would be carried out on October 1st.[75]

These responses from officials in Ottawa were met with immediate disapproval by the Colonial Office in London:[76]

> Referring to my telegram of 25th September. Her Majesty's Government anxious to know nature of Sproule's offence, and grounds refusing to delay execution. Telegraph at once what has been done. Stanhope

Due to these repeated interventions by British officials from both London and Washington, it is not surprising that Burbidge was summoned by the Prime Minister, Sir John A. Macdonald, to meet with Council to discuss the question on September 28th.[77] Once again however, it was decided that Sproule would be denied the respite.[78]

Still dissatisfied, the imperial government continued to press officials in Ottawa.[79] On September 30th, one day prior to the scheduled execution, the

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74 Telegram from Lord A. Russell, the Administrator for the Government of Canada, to Sir Lionel Sackville West, the British Representative in Washington (24 September 1886) CO 42/788, PRO (Kew), London.

75 Telegram from G.W. Burbidge, Deputy Minister of Justice, to the Governor General's Secretary for the attention of the Secretary of State for the Colonies (27 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa.

76 Telegram from Secretary of State for the Colonies, London, to the Administrator of the Government of Canada (27 September 1886) in *ibid.* and in CO 42/788, PRO (Kew), London.

77 Letter from Joseph Pope, Private Secretary to the Premier, Earnscliffe, to G.W. Burbidge, Deputy Minister of Justice (28 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa.

78 Telegram from G.W. Burbidge, Deputy Minister of Justice, to Theodore Davie, Victoria, British Columbia (28 September 1886) in *ibid*.

79 Telegram from T. F. Bayard, American Secretary of State to American Legation in London for Foreign Office (30 September 1886) CO 42/788, PRO (Kew), London.

Secretary of State for the Colonies urged the government to reconsider the matter and order a respite:[80]

> Following telegram received from United States of America Government to Minister. Telegram begins- Ask respite until Her Majesty's Government have opportunity to consider compendium of Sproule's case now on the way to London by mail. Telegram ends. I recommend favorable consideration the request which is made on responsibility of Friendly Government. United States Government has been informed that powers of pardon delegated to Governor General of Canada.

A similar telegram was sent to Ottawa by Sackville West noting that the United States' "Secretary of State prays that sufficient time may be given for arrival of documents sent to England last week."[81]

Unhappily, the government of Canada respected the wishes of the British authorities and reversed its decision to grant Sproule a respite.[82] As Macdonald explained to the Governor General, this action was taken "with the greatest reluctance & only in deference to the request of H.M. Gov't" and that "we sincerely hope that there will be no further action from Downing Street." Macdonald also noted that he had spoken to Mr. Justice Grey who had tried the case and "there was no doubt of [Sproule's] guilt."[83]

Moreover, the Dominion government's dissatisfaction with imperial interference in the Canadian criminal justice system was expressed formally in a telegram to the Secretary of State for the Colonies:[84]

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[80] Telegram from the Secretary of State for the Colonies to the Administrator of the Government of Canada (30 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa and in CO 42/788, PRO (Kew), London.

[81] Telegram from Sir Lionel S. Sackville West, British representative in Washington, to the Administrator of the Government of Canada (30 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa.

[82] "Rush" telegram from G.W. Burbidge, Deputy Minister of Justice, to P.A.E. Irving, Deputy Attorney General, Victoria, British Columbia (30 September 1886) in *ibid*.

[83] Letter from Lord Lansdowne, Governor General to J. Bramston, Colonial Office, enclosing an extract of an undated letter to Lansdowne from Sir John A. Macdonald, Prime Minister (16 October 1886) CO 42/788, PRO (Kew), London.

[84] Telegram from the President of the Privy Council, Canada, to the Secretary for the Governor General to be forwarded to the Secretary of State for the Colonies, and a copy thereof to Her Majesty's Minister at Washington (30 September 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa and in CO 42/788, PRO (Kew), London.

> In deference to the request from Her Majesty's Government, my Government advise me [to] direct sentence death passed on Sproule to be respited until October 29th but protest against any foreign Government impugning our judicial proceedings or in any way interfering with the administration of Justice here.

This protest, combined with discussions between Lord Lansdowne and officials at the Colonial Office,[85] provided the Secretary of State for the Colonies with an insight into the awkward situation the government of Canada found itself in. He responded to their objections regarding American involvement in Canadian judicial matters by stating that "[I] am disposed to give support to protest but shall wait conclusion of case."[86]

Lansdowne clearly was sympathetic toward the Canadian situation. In a letter to the Colonial Office he urged officials to avoid becoming involved in the operation of the Dominion's legal system:[87]

> I am strongly of opinion that any interference with the course of the criminal law of the Dominion at the instance of a Foreign Power is undesirable except where the most urgent necessity for such interference can be shewn to exist. If it were to be admitted that, after a case had been taken from Court to Court in the Dominion and finally disposed of by the highest Canadian Tribunal, it could be reopened upon an ex parte statement put forward by the Representative of a Foreign Power the operation of the criminal Law in this country would be seriously impeded.

As the representative of the British government in Ottawa, Lansdowne clearly was more in touch with Ottawa officials' actions and attitudes toward the issue.

In the end, Sproule's request for leave to appeal was not dealt with by the Judicial Committee. The imperial tribunal never received the convicted man's petition and it was reported that Sproule's resources were exhausted.[88] Instead,

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85 Lord Lansdowne, Governor General, had discussions with officials in the Colonial Office when he was visiting London in October 1886. Based on the recorded comments made in the minutes of the Colonial Office records, it would appear that Lansdowne greatly influenced London officials on the Sproule matter, minutes dated 8–13 October 1886, CO 42/788, PRO (Kew), London.

86 Cablegram from the Secretary of State for the Colonies to the Administrator of the Government of Canada (14 October 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa and in CO 42/788 PRO (Kew), London.

87 Letter from the Marquis of Lansdowne, Governor General, to E. Stanhope, Secretary of State for the Colonies (5 January 1887) in *ibid*.

88 Telegram from the Canadian High Commission, London, to G.W. Burbidge, Deputy Minister of Justice, Ottawa (14 October 1886) RG 13, vol. 1424, Capital Case file 210A–Sproule, R.E., NAC, Ottawa.

the government of Canada examined all the material that originally was to be forwarded to London. After reviewing these papers, it decided "to allow the law to take its course."[89] Sproule was executed on 29 October 1886.

The reaction of officials in Ottawa to the Colonial Office's involvement in the Sproule matter was one of dismay and frustration. Upon receiving approval sometime in mid-October, Burbidge sent a cablegram to the High Commission in London reviewing the events of the month of September. He noted that after an intervention by the imperial government, which had been "moved" by the United States government, the Canadian government's decision to deny Sproule a respite was reversed.[90] Burbidge asked Canadian officials to contact the Attorney General of the imperial government and explain that these criminal appeals to the Judicial Committee had to come to an end:[91]

> Canadian Government following precedents Whalen's [*sic*] case eighteen sixty eight, Smith seventy six, and Connors eighty six, ... urge on Attorney General urgent necessity [to] secure decision from Privy Council, that view British North America Act section[s] ninety one and one hundred and one, and Canada Supreme Court Act, seventy five, sections forty seven, forty nine and fifty, and inconvenience such appeals paralyzing administration criminal justice here, Privy Council will not entertain any criminal appeal from Canada.

The high character of the Canadian courts, the status of the Dominion in the Empire and the fact that the pardoning power was now vested in the Governor General were cited as additional factors for the British government to take into consideration in ending such appeals.[92]

The issue was immediately drawn to the attention of the Solicitor General of the imperial government. In addition, however, the Canadian High Commissioner, Charles Tupper, contacted the Under-Secretary of State for the Colonies. According to Tupper, the official appeared to agree with Canada's position and advised the High Commissioner to make a written representation

89 Telegram from J.J. McGee, Clerk of the Privy Council, Ottawa, to the Secretary of the Governor General (20 October 1886) in *ibid*.

90 Cablegram from G.W. Burbidge, Deputy Minister of Justice, Ottawa to Canadian High Commission, London (draft dated 13 October 1886, no date on final copy) in *ibid*. and in RG 13, Series B–2, Central Registry Files, vol. 2250, File 121/1886, 1886/10/13–1888/11/12, NAC, Ottawa.

91 *Ibid*.

92 *Ibid*.

to Her Majesty's Government.[93] This was accomplished in a letter to the Colonial Office in late November or early December of 1886.[94] Although the original copy of this document appears to be unavailable, it is known that the Minister of Justice, now J.S.D. Thompson, instructed Tupper to ask "that the question [of criminal appeals to the Judicial Committee] may be considered by the Canadian government and any necessary instructions sent to you."[95]

IV. LEGISLATION TO ABOLISH CRIMINAL APPEALS, 1887 AND 1888

Unhappy with the status quo in 1886, the Minister of Justice, J.S.D. Thompson, had his department prepare a memorandum outlining the feasibility of enacting a statute to end criminal appeals to the Judicial Committee. Its conclusion was both positive and encouraging. Officials in the department held that the Parliament of Canada had the legislative competence to abolish appeals to the Judicial Committee because of the powers invested in it by the *British North America Act, 1867.* They cited the federal government's powers under section 91 to regulate matters pertaining to the peace, order and good government, and its authority to legislate in the area of criminal law and procedure. Section 101 also was cited as entitling the Parliament of Canada to establish a General Court of Appeal. It was noted that such a court had been established under the *Supreme and Exchequer Court Act, 1875*[96] and that this court was given the power to hear appeals for all convictions.[97]

Some case law also was reviewed. As in the memorandum regarding the *Connor* appeal, officials cited *Regina* v. *Eduljee Byramjee*[98] as an authority that Her Majesty already had parted with the prerogative in criminal appeals. Also

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93 Letter from Charles Tupper, High Commissioner for Canada in London, to the Honourable J.S.D. Thompson, Minister of Justice, Ottawa (19 November 1886) RG 13, Series B–2, Central Registry Files, vol. 2250, File 121/1886, 1886/10/13–1888/11/12, NAC, Ottawa.

94 Letter from Charles Tupper, High Commissioner for Canada in London, to the Under Secretary of State for the Colonies, London (draft dated 10 November 1886, although official letter not sent until at least 30 November 1886) in *ibid*.

95 Letter from J.S.D. Thompson, Minister of Justice, to Charles Tupper, High Commissioner for Canada in London (30 November 1886) in *ibid*.

96 *Supreme and Exchequer Court Act, 1875* (Canada), 38 Vict., c. 11.

97 "Appeals to the Privy Council," Memorandum for the Minister of Justice by the Department of Justice (1886), DJ 1314.86, RG 13, Series B–2, Central Registry Files, vol. 2250, File 121/1886, 1886/10/13–1888/11/12, NAC, Ottawa.

98 *Ibid.*, citing *Regina* v. *Eduljee Byramjee, supra* note 23.

referred to again was *Cuvillier* v. *Aylwin*,[99] where it was held that the legislature, acting in conjunction with the Sovereign, could limit the rights of any petitioner. The memorandum did note, however, that some uncertainty now surrounded the outcome of this case since the Judicial Committee had rendered its opinion in *Re. Marois*.[100]

In *Marois*, the Judicial Committee examined the issue of whether an appeal in a civil matter from the Court of Queen's Bench in Lower Canada could be heard by the tribunal. The statute governing such disputes provided that there would be no appeal unless the amount in question exceeded £500. In this case, £165 was in issue between the parties. The Judicial Committee allowed the appeal and found that there was nothing in the legislation that expressly took away the prerogative right to appeal to the tribunal.[101] In reaching this conclusion, the Judicial Committee did not follow the precedent established in *Cuvillier* v. *Aylwin*.[102] Although it was held that it could not "be considered as intimating any opinion whether [*Cuvillier*] could be sustained or not," it stated that "their Lordships [were] not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded."[103]

In addition to reviewing the legal authorities for abolishing appeals to the Judicial Committee, the Justice Department memorandum indicated that it appeared that the British authorities would be amenable to any Canadian legislative action ending criminal appeals to the Judicial Committee. The author of the document, most likely Burbidge, emphasized that the Attorney General of the imperial government clearly had stated that abolishing criminal appeals to the tribunal was within the competence of the Dominion government:[104]

> 1. It is clear I think that the Parliament of Canada can in criminal cases take away all appeals to the Privy Council. Sir Richard Webster told me when in England that he had so advised Her Majesty's Government.

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99 *Ibid*., citing *Cuvillier* v. *Aylwin*, *supra* note 45.

100 *Ibid*., citing *Re. Marois* (1862), 15 Moore's P.C. Cases 189.

101 *Re. Marois* (1862), 15 Moore's P.C. Cases 189 at 193.

102 *Cuvillier* v. *Aylwin*, *supra* note 45. In the report of the *Cuvillier* case in Stuart's Reports at 527 there is a note stating that Lord Brougham argued that this case was decided incorrectly, in Cannon, *supra* note 2 at 456.

103 *Supra* note 101 at 193.

104 "Appeals to the Privy Council" Memorandum for the Minister of Justice by the Department of Justice (1886), DJ 1314.86 RG 13, Series B–2, Central Registry Files, vol. 2250, File 121/1886, 1886/10/13–1888/11/12, NAC, Ottawa.

The memorandum further indicated that members of the Judicial Committee also would be likely to support legislation abolishing criminal appeals. Although the effect of ending such appeals had not been dealt with by the tribunal, it "would no doubt be more ready in a criminal than in a civil case to hold the appeal taken away" notwithstanding a clause saving Her Majesty's rights and prerogatives because their Lordships repeatedly had recognized the great inconvenience caused by these appeals.[105]

On 25 April 1887, the Minister of Justice introduced *An Act to amend the law respecting Procedure in Criminal Cases*[106] into the House of Commons. The "principal feature" of the new legislation was to ensure that "no appeal [from a criminal case] will be had to the Judicial Committee of the Privy Council from the courts of last resort in Canada:"[107]

> Notwithstanding any royal prerogative, or anything contained in "*The Interpretation Act*," or in "*The Supreme and Exchequer Courts Act*," no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard.[108]

The Minister of Justice explained that although there was a "very good reason to believe that, under the statute as it now exists, there is no appeal to the Judicial Committee in such matters,"[109] it was necessary to give legal effect to what was already the current practice of the tribunal because there had been no conclusive "determination of the committee that such an appeal does not lie."[110] Another reason cited for the legislation was the widespread belief — even held by members of the Judicial Committee — that long delays in the criminal appeal process had the potential to handicap the Canadian legal system:[111]

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105 *Ibid*.

106 *An Act to amend the law respecting Procedure in Criminal Cases, 1887* (Canada), 50 & 51 Vict., c. 37.

107 *Debates of the House of Commons*, vol. 1 (25 April 1887) at 100 (J.S.D. Thompson, Minister of Justice).

108 *Supra* note 106, s. 1, amending s. 268(5) of the *Criminal Code*.

109 *Debates of the House of Commons*, vol. 2 (31 May 1887) at 644 (J.S.D. Thompson, Minister of Justice).

110 *Ibid*.

111 *Ibid*. Thompson noted that members of the Judicial Committee themselves had cited the negative effects arising from the delay as one of the main reasons they were reluctant to hear criminal cases and in particular referred to in *Regina* v. *Bertrand*, *supra* note 22 at 530 and *Falkland Islands Co.* v. *The Queen*, *supra* note 21 at 312.

> I need hardly remind the House that very great inconvenience in the administration of the criminal law in a country like Canada would result from an appeal being held to lie to a tribunal so distant as the Judicial Committee of the Privy Council. The result of such an appeal would be that a long delay would be made necessary.[112]

The Minister of Justice alluded to the problems encountered by the government in the *Sproule* case to illustrate his point. He noted that had such an appeal been heard by the imperial tribunal, it would have taken up to two years for the matter to be finally decided and the "the criminal law of the country would have been entirely paralysed in that particular case." Moreover, he argued that "the execution of the law eventually, after the lapse of so long a time, would appear cruel, as public attention would have become disassociated from the crime itself."[113]

The bill passed through the House of Commons with limited debate. Three Members of Parliament addressed the government measure and only David Mills, the representative from Bothwell, opposed it. Mills argued that while he could "see very great reason for refusing to grant the right of appeal in criminal cases ... and ... conceive that, in the great majority of cases, ... great inconvenience would arise," he did not believe that the provisions were necessary in Canada. Only in rare cases did anyone seek leave to appeal to the Judicial Committee in criminal matters and consequently "no serious direct inconvenience has arisen in this country on account of the prerogative right of appeal."[114]

Mills also contended that the imperial government, not Canada, should decide whether to abolish Dominion appeals to the Judicial Committee. Mills was concerned that ending such appeals might impact negatively on the Empire's relations with other countries. He outlined a possible scenario similar to the *Sproule* matter to support his argument:[115]

> Supposing someone in this country was tried for a criminal offence which rendered him liable to death, but which was connected with the relations between the United Kingdom and the United States. The [Imperial] Government which would be responsible for the maintenance of peace between the United Kingdom and the United States, might have very serious objection[s] to permit this country to legislate in such a way as to make it impossible

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[112] *Ibid.*

[113] *Ibid.* at 645.

[114] *Debates of the House of Commons*, vol. 2 (31 May 1887) at 644 (D. Mills, Member of Parliament for Bothwell).

[115] *Ibid.*

> for the Imperial Government to protect its own interests by interposing its sovereign authority.

Therefore, to avoid serious difficulties, Mills argued that the prerogative right to appeal to the Judicial Committee should remain in existence.[116]

The other two Members who spoke in the House of Commons about the bill raised small technical issues. They did not, however, object to the bill in principle. Mr. Skinner, a Liberal from New Brunswick, wanted to ensure the wording of the bill covered all of the courts in that province. Thompson agreed to an amendment to achieve this objective. Mr. Weldon, the representative from Saint John, was concerned that the legislation might eliminate the possibility of any appeal from some trial courts.[117] The Minister of Justice stated that he thought the issue was "worthy of attention" and promised to give it consideration.[118]

The bill received first reading in the Senate on 2 June 1887. No one spoke against it. During the debates, Mr. Abbott, the Leader of the Government in the Senate, reviewed each of its provisions and, like the Minister of Justice, explained that the purpose of the legislation was to stop the appeal from being used to "attempt to obtain delays of execution in criminal matters."[119] He also noted the bill would help to bring an end to any uncertainty about the right to appeal to an end:[120]

> [T]here has been some doubt ... as to this right of appeal in criminal cases to the Privy Council. The Government have been of the opinion that there is no such appeal, and they have on more than one occasion, I think, carried out the sentence of the court disregarding applications, informal or otherwise, which were made to appeal. They are of the opinion now that it would be advisable to settle this question once [and] for all ...

Amusingly, in response to a question about the ability of the government to take away the royal prerogative, Abbott stated that he did not think the legislation would necessarily mean that "Her Majesty and her Privy Council could not grant

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116 *Ibid*. at 644–45. For a insightful analysis into Mills' view of the Canadian federal state and its courts, see R.C. Vipond, *Liberty and Community, Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

117 *Ibid*. at 645.

118 *Ibid*.

119 *Debates of the Senate* (10 June 1887) at 290 (Mr. Abbott, Leader of the Government in the Senate).

120 *Ibid*. (8 June 1887) at 254.

permission to appeal if they thought proper so to do."[121] Abbott clearly was out of step with the government, perhaps because he only had been appointed to the Senate as House Leader a few weeks prior to introduction of the bill.

The bill received third reading in the Senate on 10 June 1887. Yet less than a year later, on 19 March 1888, the Minister of Justice introduced and passed a second statute to abolish criminal appeals to the Judicial Committee.[122] He noted that the new legislation was necessary because "it has been considered expedient to define [the 1887 Act] more exactly and precisely:"[123]

> The words used [in the 1887 Act] were ... that no appeal should lie to any court created by the Parliament of Great Britain. One would suppose that this would cover the case of the Privy Council, but, at the time of drafting the Bill, a decision of the House of Lords[[124]] was overlooked, in which these words ... were considered to mean not the Judicial Committee of the Privy Council ... but ... a Court of Appeal under the authority of the Parliament of Great Britain and was not applicable to the Judicial Committee of the Privy Council.[125]

The problem with the wording of the 1887 legislation was raised by Burbidge. During the recess of the House of Commons, his attention had been drawn to *James Johnston* v. *The Ministers and Trustees of St. Andrews Church, Montreal*.[126] After reviewing this Judicial Committee decision, "it occurred to [him] that the 5th Clause of the Act of 1887 had after all not been carefully enough drawn to effect beyond all doubt" the abolition of all criminal appeals to the Judicial Committee "so [he] suggested the [1888] amendment."[127]

It is surprising Burbidge and Thompson made this mistake. The Canadian government had faced this *very* issue only twelve years earlier. In 1875, the Canadian government enacted the *Supreme and Exchequer Court Act, 1875*.

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121 *Ibid*. (10 June 1887) at 291.

122 *An Act Further to amend the law respecting Procedure in Criminal Cases, 1888* (Canada), 51 Vict., c. 43.

123 *Debates of the House of Commons*, vol. 1 (19 March 1888) at 238 (J.S.D. Thompson, Minister of Justice).

124 The decision referred to was in fact a decision by the Judicial Committee, *James Johnston* v. *The Ministers and Trustees of St. Andrews Church, Montreal* (1877), 3 A.C. 159. It is cited in a letter from Justice Burbidge to J.S.D. Thompson, Minister of Justice (18 May 1888) RG 13, Series B–2, Central Registry Files, vol. 2253, File 56/1888, NAC, Ottawa.

125 *Debates of the House of Commons*, vol. 2 (19 April 1888) at 942 (J.S.D. Thompson, Minister of Justice)

126 *Supra* note 124.

127 Letter from Justice Burbidge to J.S.D. Thompson, Minister of Justice (18 May 1888) RG 13, Series B–2, Central Registry Files, vol. 2253, File 56/1888, NAC, Ottawa.

Section 47 of the statute purported to abolish all appeals to the Judicial Committee save those granted special leave by virtue of the royal prerogative.[128] The British government was opposed to this provision and threatened to disallow the Act. However, the legislation was left in place on the understanding that this section had no effect. Lord Cairns, the Lord Chancellor, advised Edward Blake, then Canadian Minister of Justice, that section 47 of the Dominion statute only abolished appeals to an "imperial court of appeal" and as such a court was never established, the provision was inoperative. Lord Cairns further noted that appeals to the tribunal also were saved by virtue of the royal prerogative.[129]

The British government's policy on the 1875 Canadian enactment was given judicial sanction by Lord Cairns in the Judicial Committee's decision in *James Johnston* v. *The Ministers and Trustees of St. Andrews Church, Montreal.* Although the tribunal refused to grant special leave to appeal to hear this dispute involving a damages award of £300, it effectively implemented the British government's position on appeals to the Judicial Committee by finding that section 47 of the *Supreme and Exchequer Court Act, 1875* did not achieve its purpose:[130]

> "no appeal shall be brought," *et cetera*. Those words [of the Canadian legislation] ... refer to what may be called the hypothetical establishment of a Court by the Parliament of *Great Britain* and *Ireland* ... and inasmuch as no Court of that kind has been established, that part of the section may be omitted from our consideration. ...
>
> Now their Lordships have no doubt whatever ... that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section.

Canadian officials believed that the 1888 legislation to abolish criminal appeals was necessary because the 1887 statute would be ineffective as it was based on the wording of the inoperative section 47 of the 1875 statute. Yet, despite the government's bungling of the 1887 legislation, there was no criticism

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128 *Supra* note 96, c. 11, s. 47. Section 47 reads: "The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard: Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."

129 Farr, *supra* note 2 at 149. See also Edward Blake's account of his meeting with Lord Cairns, the Lord Chancellor, on the *Supreme and Exchequer Court Act, 1875* set out in a letter to Prime Minister Alexander Mackenzie, reprinted by F. Underhill in "Notes and Documents" (1938) 19 Can. Hist. Rev. 292 at 294, paras. 1–3.

130 *Supra* note 124 at 162.

or opposition in either the House of Commons or the Senate to the 1888 legislation to abolish criminal appeals to the Judicial Committee. The new enactment adopted by the Parliament of Canada corrected the 1887 mistakes and clearly specified that there would be no criminal appeals to any United Kingdom court or authority, expressly including Her Majesty in Council.[131]

V. THE REACTION OF THE BRITISH AUTHORITIES

In April 1888, British authorities in the Lord Chancellor's Office and the Colonial Office learned of the 1887 statute, the first piece of Canadian legislation abolishing criminal appeals to the Judicial Committee. Once again, the Chief Law Officers of the Crown were called upon to write an opinion on the matter. The report of the Attorney General, Sir Richard Webster, and the Solicitor General, Sir Edward Clark, was accepted widely by senior officials in Her Majesty's government. It indicated that while it was clear that the Canadian legislation was intended to bring an end to the practice of the Judicial Committee entertaining criminal appeals, it found that it had failed to accomplish this objective effectively.[132]

Two sections of the Canadian statute were deemed to have been incorrectly drafted. First, it was held that section 1, subsection 5 would not take away the prerogative because it refers "not to the Privy Council, but to a special Statutory Court of Appeal should such a Court be established" in the future:[133]

> Subsection 5 in which the royal prerogative is expressly mentioned prohibits appeals in criminal cases from Canadian Courts to "any Court of Appeal established by the Parliament of Gt Britain and Ireland by which appeals or petitions of Her Majesty in Council may be advised to be heard."- As no such court of appeal has been established this subsection appears to be at present inoperative ...[134]

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[131] *Supra* note 122, s. 1, amending s. 268(5) of the *Criminal Code*.

[132] Report by Sir Richard Webster, MP, the Attorney General, and Sir Edward Clark, MP, the Solicitor General, to Lord Knutsford, Secretary of State for the Colonies (12 April 1888) CO 42/797, PRO (Kew), London.

[133] Review of the Law Officers' Report in the Privy Council Minutes (25 April 1888) vol. for 1888, P.C. 4/25, page 96, PRO (Chancery Lane), London.

[134] *James Johnston* v. *The Ministers and Trustees of St. Andrews Church (Montreal)* (1877), 3 A.C. 159 is cited as an authority for this position in the report by Sir Richard Webster, MP, the Attorney General, and Sir Edward Clark, MP, the Solicitor General, to Lord Knutsford, Secretary of State for the Colonies (12 April 1888) CO 42/797, PRO (Kew), London. Lord Knutsford's interpretation of their report is cited here, from a letter by Lord Knutsford, Secretary of State for the Colonies, to the Marquis of Lansdowne, the Governor General of Canada (1 May 1888) CO 42/797, PRO (Kew), London and in RG 13, Series

Secondly, it was viewed that section 1, subsection 3 of the Act, declaring that the judgments of the Supreme Court were final and conclusive, only ended appeals as of right. The prerogative right of appeal, not being expressly mentioned, remained.[135]

Lord Knutsford, now Secretary of State for the Colonies, supported by his Under Secretary, Sir Robert G.W. Herbert, was of the opinion that "disallowance of [the] Act on grounds of policy would be highly inexpedient."[136] This fact, combined with the Law Officers Report, led Lord Knutsford "to advise [the Lord President of the Privy Council] its allowance being advised that it does not take away Her Majesty's prerogative right to entertain appeals from the Canadian Courts in criminal cases."[137] One month later, on 1 May 1888, the British government notified the Governor General of Canada and the Minister of Justice that they were not going to disallow the 1887 Act because it did not take away or limit the royal prerogative. To their surprise, they were advised that the Canadian government already had come to this realization and had passed new legislation to abolish appeals.[138]

The Governor General was somewhat apologetic for this turn of events. He wrote to Lord Knutsford that he "regret[ted] that [his] attention was not called either to the Act of this or to that of last year." But he suggested that there was nothing deceptive in the Canadian government's actions as their officials appeared "to have been under the impression that no difference of opinion existed between the Government of the Dominion and that of Her Majesty upon the point in issue."[139] Nevertheless, officials in the Colonial Office were irritated

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B–2, Central Registry Files, vol. 2253, File 56/1888, NAC, Ottawa.

135 *Cushing* v. *Dupuy* (1880), 5 A.C. 409, is cited as an authority for this position in the report by Sir Richard Webster, MP, the Attorney General, and Sir Edward Clark, MP, the Solicitor General, to Lord Knutsford, Secretary of State for the Colonies (12 April 1888) CO 42/797, PRO (Kew), London.

136 The Privy Council Office Register (21 April 1888) P.C. 9, no. 31, PRO (Chancery Lane), London.

137 Minutes by Edward Wingfield, Assistant Under Secretary (16 April 1888) CO 42/797, PRO (Kew), London.

138 Letter from Lord Knutsford, Secretary of State for the Colonies, to the Officer Administering the Government of Canada (1 May 1888) and letter from Lord Knutsford to the Marquis of Lansdowne, Governor General (1 May 1888) CO 42/797, PRO (Kew), London.

139 Letter from the Marquis of Lansdowne, Governor General, to Lord Knutsford, Secretary of State for the Colonies (18 May 1888) CO 42/796, PRO (Kew), London; the Canadian attitude toward the legislation is confirmed by Justice Burbidge in a letter from him to J.S.D.

at the manner in which the Canadian government had passed the 1888 legislation:[140]

> This act if allowed will effectively take away any appeal to the Judicial Committee. It was a very queer action on the part of the Canadian Gov't to smuggle these acts through without specifically calling the Governor General's attention to them.

Similarly Edward Wingfield, Assistant Under-Secretary, was disturbed that the Governor General was advised to assent to these acts without the issue having been discussed.[141]

Despite the concerns about the way in which the Canadian government went about achieving their objective, there appears to have been general agreement among Colonial Office officials that the Canadian government should be allowed to abolish appeals in criminal matters. Wingfield sided with Ottawa's position, noting that such appeals seemed inadvisable. He further speculated that the Privy Council Office would be less determined than in 1876 to retain appeals now that the powerful registrar to the Judicial Committee, Henry Reeve, had retired.[142] Sir Robert G.W. Herbert also "agree[d] that it may be preferable to get rid of appeals to the Privy Council in *criminal cases*."[143] Lord Knutsford accepted the arguments of his officials and decided to put the Canadian case to the Lord Chancellor as soon as the Canadian government provided a more detailed explanation of their actions.

The Canadian government did explain the rationale behind their legislation in two letters. The first was a short document, justifying the legislation on policy grounds, noting that it "is highly in the public interest and that its disallowance at the instance of the Imperial authorities would be prejudicial to the

Thompson, Minister of Justice (18 May 1888) *supra* note 64.

140 Note in the minutes of the Colonial Office file by P.T.O., signed also by J.A. and E.B. Pennell on 8, 9 June 1888, CO 42/796, PRO (Kew), London.

141 Note in the minutes by Edward Wingfield, Assistant Under-Secretary at the Colonial Office (9 June 1888) in *ibid*.

142 *Ibid*. Wingfield is referring to the Canadian Government's legislation which purported to abolish all appeals to the Judicial Committee with the passage of the *Supreme and Exchequer Court Act, 1875*. See McKinnon, *supra* note 2 at 258–74 and Underhill, *supra* note 2 at 245–94.

143 Note in the minutes by Sir R.G.W. Herbert, Under-Secretary for the Colonial Office (22 June 1888) CO 42/796, PRO (Kew), London.

administration of Justice in Canada."[144] The second reviewed the legal arguments and authorities for these actions.[145] Both however, stressed the importance of being advised "should there be any doubt as to the wisdom of the Statute or any intention of exercising the power of disallowance."[146]

Accordingly Lord Knutsford advised the Lord Chancellor, Lord Halsbury, that he was of the opinion that these appeals should come to an end:[147]

> I think it only right to state that looking to what has passed upon the subject; to the very strong desire expressed by the Dominion Legislature and Government; to the undoubted excellence of the Supreme Court of Canada; and to the disfavour with which appeals in Criminal cases are viewed by the Privy Council as is shewn in the cases referred in the report of the Colonial Minister of Justice & other cases, I am personally disposed to advise that H.M. should waive her Royal Prerogative & that the decision of the Supreme Court of Canada in criminal cases should be final.

In the minutes attached to this draft letter, Wingfield and Knutsford discussed the possibility of imperial legislation to ensure that the objective of the 1888 Canadian legislation was put into effect. Both agreed with the Canadian Minister of Justice, however, that there was "no need for draft legislation." Lord Knutsford noted that "our Law Officers would have taken the point if there had been anything in it."[148] Unfortunately, the Lord Chancellor's response to the Colonial Office's letter is missing or unavailable. However, from the brief notes made by the officials at the Colonial Office regarding the Lord Chancellor's letter, one can get the gist of his position:[149]

> [T]his letter clearly, in my opinion, consents to the act being left in operation on grounds both of principle and policy, though the Lord Chancellor does not undertake to say that it sufficiently effects its object.
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> ...

[144] Order in council (21 June 1888) no. 1367 G, CO 42/796, PRO (Kew), London.

[145] Order in council (5 September 1888) no. 1437 G, CO 42/796, PRO (Kew), London.

[146] Order in council (21 June 1888) no. 1367 G, CO 42/796, PRO (Kew), London.

[147] Letter from Lord Knutsford, Secretary of State for the Colonies, to Lord Halsbury, Lord Chancellor (19 October 1888) CO 42/ 796, PRO (Kew), London.

[148] Notes made by Lord Knutsford and Edward Wingfield, in *ibid*.

[149] Sir R.G.W. Herbert, Under-Secretary for the Colonial Office (31 October 1888) in notes made by members of the Colonial Office pertaining to the Lord Chancellor's letter on the subject of the abolition of Canadian criminal appeals (24 October 1888) CO 42/796, PRO (Kew), London.

> [Lord Chancellor] Concurs in desirability of allowing the finality of the decisions of the Supreme Court of Canada, but cannot say that the objective will be obtained by assenting to the acts in question.[150]

The Lord Chancellor's letter clearly supported the Canadian legislation in principle, although he was uncertain as to its legality. Wingfield noted that it was "not quite clear from this letter whether the Lord Chancellor doubts the possibility of the prerogative right of the Crown to entertain appeals from Canadian Courts in criminal cases being taken away by a Canadian Act assented to by the Queen or the sufficiency of this particular Act to effect that object."[151]

Some doubt, however, was entertained about the Lord Chancellor's legal opinion. Wingfield appears to find it difficult to believe that the Canadian government could not limit the royal prerogative. He cites the Canadian Minister of Justice's authorities for the Act, particularly *Cushing* v. *Dupuy*, and notes that even Sir Richard Webster, Her Majesty's Attorney General, thought that a properly drawn act by the Canadian government could bring an end to such appeals in 1885. Nevertheless he argues that "even if there is a reasonable doubt as to the sufficiency of the Act" the matter should not be pursued:[152]

> [T]he Canadian Gov't who entertain no doubts of [the Act's] validity if allowed to remain in operation would probably not wish for its confirmation by Imperial legislation which would cast doubts upon the extent of the powers of the Colonial Legislature ... it would seem advisable that it should be allowed and that the question of confirming it by Imperial legislation should not be raised unless and until the sufficiency of the Colonial Act is successfully impeached before the Judicial Committee of the Privy Council.

Lord Knutsford supported this position. He was "disposed to think that the local Act, ratified by H.M. [was] sufficient," and that it "would not be desirable to raise any question about the necessity of Imperial legislation."[153]

Accordingly, Lord Knutsford advised the government of Canada that he "decided ... not to advise H.M. to interfere with the spectrum of this Act."[154] The

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150 Summary of Lord Chancellor's letter made by a member of the Colonial Office, *ibid*.

151 Note by Edward Wingfield, Assistant Under Secretary at the Colonial Office (30 October 1888) pertaining to the Lord Chancellor's letter on the subject of the abolition of Canadian criminal appeals, in *ibid*.

152 *Ibid*.

153 Lord Knutsford, Secretary of State for the Colonies (3 November 1888) in *ibid*.

154 Lord Knutsford, Secretary of State for the Colonies, to Lord Stanley, Governor General (12 November 1888) CO 42/797, PRO (Kew), London. In the National Archives papers in Ottawa, it was noted that the Governor General advised the Minister of Justice that the Act would not be disallowed, RG 13, Series B–2, Central Registry Files, vol. 2253, File

Canadian government was never alerted to the uncertainty surrounding the legality of the Act, nor the support it received in principle by the members of the Colonial Office and the Lord Chancellor.

VI. CONCLUSION

In 1875, the Canadian government's decision to abolish all appeals to the Judicial Committee was based, at least in part, on Canadian nationalism and a desire to promote greater Dominion autonomy.[155] Twelve years later, however, the government's decision to abolish all *criminal* appeals to the imperial tribunal was made for a different reason. Officials in Ottawa were concerned about the need to protect the integrity of the administration of justice. There was widespread concern that long delays before appeals could be heard before the London tribunal created uncertainty and unfairness in the Canadian judicial system.

The legitimacy and merit of the Canadian government's policy objectives in adopting this legislation were never in question. Officials at the Colonial Office in London, as well as in the Lord Chancellor's department, both accepted and supported Ottawa's rationale for the enactment. At the same time, some uncertainty existed as to whether the legislation effectively achieved its objective. However, as there was a consensus among British officials in support of the overall policy, it was decided not to alert the Canadian government to any concerns about the validity of the legislation. Moreover, to avoid appearing heavy handed, they decided neither to disallow the legislation nor to pass imperial legislation to validate the Canadian provisions.

The enactment abolishing criminal appeals remained in effect for thirty-eight years. Despite the fact that there were a number of challenges regarding its legality, the Judicial Committee repeatedly refused to examine the issue.[156] It was not until the Judicial Committee's 1926 opinion in *Nadan* v. *The King*, that the provision was held to be invalid.[157] At that time, the imperial tribunal struck down the legislation to ensure that the Irish Free State would not be able to enact

56/1888, NAC, Ottawa.

155 See MacKinnon, *supra* note 2 at 266, and Farr, *supra* note 2 at 133.

156 See *Attorney-General for Ontario* v. *Daly et al.*, [1924] A.C. 1011 and *Attorney-General for Ontario* v. *Reciprocal Insurers et al.*, [1924] A.C. 328.

157 *Supra* note 1.

similar statutory provisions.[158] Criminal appeals to the Judicial Committee were, however, brought to an end with the passage of the Parliament of Canada's *Criminal Code Amendment Act, 1933*.[159] The validity of this Canadian legislation was upheld by the Judicial Committee in *British Coal Corporation et al.* v. *The King*[160] in part because of the changes to the Canadian constitution brought about by the passage of the *Statute of Westminster*.[161]

158 For an analysis of the Judicial Committee's actions in the *Nadan* decision, see J.D. Krikorian, "British Imperial Politics and Judicial Independence" (2000) 33 Can. J. Pol. Sc. 291.

159 *Criminal Code Amendment Act, 1933* (Canada), 23 & 24 George V, c. 53, s. 17.

160 *British Coal Corporation et al.* v. *The King*, [1935] A.C. 500.

161 *Statute of Westminster, 1931* (U.K.), 22 & 23 George V, c. 4.

ETHICAL CONSIDERATIONS IN MEDIA COVERAGE OF HATE SPEECH IN CANADA[1]

Raphael Cohen-Almagor[*]

In many democracies, freedom of expression and freedom of the media are guaranteed by the same constitutional provision. The author addresses the issue of media coverage of hate speech in Canada, one of the world's major exporters of hate literature. It is argued that the media should not cooperate with hate-mongers by providing them an uncontrolled platform for disseminating their ideas. This is not to say that the media should fail to report about the conduct of hate-mongers. Instead, it is argued that media coverage of hate speech should be cautious, sensitive to the interests of the group under attack and responsible. The free media should assist the democracy that enables their functioning in fighting the enemies of democracy.

Dans bon nombre de démocraties, la liberté d'expression et de la presse sont assurées par les mêmes dispositions constitutionnelles. L'auteur aborde la question de la couverture par la presse de la propagande haineuse au Canada, qui est l'un des plus gros exportateurs de littérature raciste du monde. L'auteur insiste sur le fait que la presse ne devrait pas collaborer avec des semeurs de haine en leur fournissant une tribune non contrôlée pour la propagation de leurs idées. Cela ne veut pas dire que la presse ne devrait pas signaler la conduite de semeurs de haine. Au contraire, on insiste sur le fait que la presse devrait faire preuve de prudence, de sensibilité à l'égard des intérêts du groupe remis en question et de la responsabilité dans sa couverture. Les médias libres devraient aider la démocratie qui assure leur fonctionnement en luttant contre les éléments de la démocratie.

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I. INTRODUCTION

In many democracies, freedom of expression and freedom of the media are guaranteed by the same constitutional provision. Section 2(b) of the *Canadian Charter of Rights and Freedoms*[2] holds that everyone has the following fundamental freedoms: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The First Amendment to the American Constitution prohibits the abridgement of "the freedom of speech, or of the press." The British courts tend to treat freedom of speech and freedom of the press as interchangeable terms.[3] In turn, article 5 of the German *Grundgesetz*[4]covers press and broadcasting freedom, as well as the right enjoyed by everyone to disseminate opinions freely.[5]

Having said that, in the context of racist hate speech many democracies, as well as important international conventions, prohibit the dissemination of ideas hostile to racial groups. For instance, article 266(b) of the Danish *Penal Code* outlaws statements "threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief."[6] In the Netherlands, article 137 of the *Criminal Code*[7] dictates that it is a criminal offence to "deliberately give public expression to views insulting to a group of persons on account of their race, religion or conviction or sexual preference." In Sweden, the *Freedom of the Press Act*[8] prohibits the expression of contempt for a population group "with allusion to its race, skin colour, national or ethnic origin, or religious faith." In Australia, section 3 of *Racial Hatred Act*,[9] prohibits

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[2] Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] See *e.g. A.G.* v. *Guardian Newspapers (no. 2)*, [1990] A.C. 109. See also E. Barendt, "Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?" (1991) 44 Curr. Leg. Prob. 63 at 64–65.

[4] *Basic Law for the Federal Republic of Germany* (Bonn: Press and Information Office of the Federal Government, 1994). See also G.H. Fox & G. Nolte, "Intolerant Democracies" (1995) 36 Harv. Intrnl. L. J. 1 at 32–34; D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989).

[5] In Israel no specific law guarantees freedom of speech or of the press.

[6] In J. Weinstein, "Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy" (working draft) at 27.

[7] *Criminal Code* (*Wetboek van Strafecht*) (Netherlands).

[8] *Freedom of the Press Act* (Sweden), c. 7, art. 4, online: The Swedish Parliament Homepage <www.riksdagen.se/english/society/fundamental/press/index.htm> (accessed on: 28 September 2001).

[9] *Racial Hatred Act* 1995 (Aust.), s. 3.

public behaviour that is likely "to offend, insult, humiliate or intimidate another person or group of people" if the act is done because of the race, colour or national or ethnic origin of the other person or a group.[10] In Germany, article 130 of the *Penal Code* prohibits the production, storage or use of documents inciting hatred against part of the population or against groups determined by nationality, race, religion, or ethnic origin.[11] In Israel, Amendment No. 20 (1986) to the *Penal Code*[12] makes "incitement to racism" a criminal offence. Anyone who publishes anything with the purpose of inciting racism is liable to five years imprisonment (144B), and anyone who has racist publications in his or her possession for distribution is liable to imprisonment for one year (144D). The term "racism" is defined as "persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or segments of the population — because of colour or affiliation with a race or a national-ethnic origin" (144A). And the *Race Relations Act 1976*[13] made "incitement to racial hatred" an offence in the United Kingdom in circumstances where the accused intended to incite racial hatred against any section of the public distinguished by colour, race, nationality or ethnic or national origins and the language used was threatening, abusive or insulting and was likely to stir up racial hatred.[14]

In turn, the following international conventions expressly prohibit hate speech. Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*[15] requires state parties to declare as criminal offences "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination" and participation in organizations which promote and incite racial discrimination. Article 20 of the *International*

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[10] W. Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer, 1999) at 179.

[11] *Penal Code*, StGB art. 130 (Federal Republic of Germany). Translation by F. Kübler in "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights" (1998) 27 Hofstra L. Rev. 335 at 345. For further discussion on hate speech regulation in Germany, and also France, see J.Q. Whitman, "Enforcing Civility and Respect: Three Societies" (2000) 109 Yale L.J. 1279.

[12] *Laws of the State of Israel,* 1191 (13 August 1986) at 219–20. See also A. Rubinstein, *The Constitutional Law of the State of Israel* (Jerusalem: Schocken, 1980) (Hebrew).

[13] *Race Relations Act 1976* (U.K.), 1976, c. 48.

[14] *Ibid.,* s. 6. See also R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994) at 270, n. 25, 281, n. 26 [hereinafter *Boundaries*].

[15] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195 (adopted 21 December 1965) [hereinafter CERD].

Covenant on Civil and Political Rights[16] declares that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

The premise of this essay is that free expression is a fundamental right and value in democracies. It is the freedom of the individual to realize herself, to form a worldview and an opinion by giving flight to her spirit. It is the freedom of the individual and the community to bring truth to light through a struggle between truth and falsehood. The underlying assumption is that truth will prevail in a free and open encounter with falsehood. Furthermore, freedom of expression is necessary for maintaining the vitality of beliefs. It is the freedom to exchange opinions and views in a spirit of tolerance, with respect for the autonomy of every individual, and to persuade one another to strengthen, secure and develop the democratic system. Freedom of expression is crucial in indicating causes of discontent, the presence of cleavages and possible future conflicts.[17]

The second premise holds that there is a need to strike a balance between the right to freedom of expression and the harms that might result from a certain speech. It is argued that the right to exercise free expression does not include the right to do unjustifiable harm to others.[18] Indeed, one of the four key principles of the Society of Professional Journalists' Code of Ethics is the minimization of harm: "ethical journalists treat sources, subjects and colleagues as human beings deserving of respect." The Code further instructs journalists to show compassion for those who may be affected adversely by news coverage and to avoid pandering to lurid curiosity, maintaining that the "pursuit of the news is not a license for arrogance."[19]

The third premise relates specifically to the harms of hate speech and the price society is required to pay when it tolerates such speech. Hate speech causes

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[16] *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (adopted 16 December 1966) [hereinafter CCPR].

[17] A. Barak, "Freedom of Expression and Its Limitations" in R. Cohen-Almagor, ed., *Challenges to Democracy: Essays In Honour and Memory of Professor Sir Isaiah Berlin* (London: Ashgate, 2000) at 168 [hereinafter *Challenges*]; Cohen-Almagor, *supra* note 14 at 89–93; T.I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966) at 5–15.

[18] *Canadian Charter of Rights and Freedoms*, *supra* note 2, s. 1; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; *Canadian Human Rights Commission et al.* v. *Taylor et al.* (1990), 75 D.L.R. (4th) 577 (S.C.C); *R.* v. *Butler*, [1992] 1 S.C.R. 452.

[19] See Ontario Press Council, *24th Annual Report* (Toronto, Ontario, 1996) at 79.

immediate mental and emotional distress in its targets. It might also inflict psychological harm. The Canadian Supreme Court acknowledged this by using a harm-based rationale to justify criminalizing hate speech in *Keegsta.*[20] I will elaborate on this decision later. In France, a national report recognized that, in addition to psychological and moral harm, hate speech damages the individual and collective reputations of its victims.[21] Germans view a racial or ethnic attack as an affront to a person's core identity. The concept of an attack on human dignity presupposes an attack on the core area of the victim's personality, a denial of the victim's right to life as an equal in the community or treating a person as an inferior, which has the effect of excluding him or her from the protection of the constitution.[22] South Africa holds that a racial insult "harms souls."[23] In the United Kingdom, racial vilification is a form of defamation.[24] Furthermore, Canadian, French, German and British statutory documents affirm a corollary proposition about the effect of hateful speech on the community at large. The *Keegstra* ruling notes that hate propaganda can harm society as a whole. In France, the preamble to a statute on group libel declares that such "aggression is directed against the whole body politic and its social and moral fabric."[25] Article 131 of the German *Criminal Code* seeks to protect the "social harmony" endangered by incitement to racial hatred. It penalizes the dissemination, display and production of depictions of violence against people in a cruel or otherwise inhuman manner with the intent to glorify or seek to minimize the cruelty or to incite to racial hatred.[26] Common law in the United Kingdom restricts such speech in part to avoid harm to the public order.[27]

Therefore, the fourth premise is that, with due appreciation for our innate liberal inclination to provide wide latitude to freedom of expression, we must also acknowledge the need for the setting of limits. The media should develop sensitive and responsible mechanisms in their coverage of hate speech. By

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[20] See *Keegstra*, *supra* note 18.

[21] R. Delgado & J. Stefancic, *Must We Defend Nazis?* (New York: New York University Press, 1997) at 127–28.

[22] R. Hofmann, "Incitement to National and Racial Hatred: The Legal Situation in Germany" in S. Coliver, ed., *Striking a Balance* (London and Essex: Article 19, 1992) 163. For further discussion, see E. Stein, "History against Free Speech: The New German Law against the 'Auschwitz' – and Other – 'Lies'" (1986) 85 Mich. L. Rev. 277.

[23] In Delgado & Stefanic, *supra* note 21 at 128.

[24] *Ibid*.

[25] *Ibid*.

[26] Stein, *supra* note 22 at 281–86.

[27] In Delgado & Stefanic, *supra* note 21 at 128.

providing unfettered loudspeakers to hate-mongers, the media play into their hands and help spread their hatred and harmful messages. By 1965, the Special Committee on Hate Propaganda noted its worry that Canada "has become a major source of supply of hate propaganda that finds its way to Europe and specifically to West Germany."[28] Canada remains a major exporter of hate literature, and it is of interest to examine to what extent the media cooperate with hate-mongers by providing them a platform for disseminating their ideas.[29]

Let me substantiate this premise with the following example, taken from Israeli politics. In October 1995, during a large demonstration by the Israeli political right protesting against the Oslo Accords and the Rabin government, photomontages of Prime Minister Yitzhak Rabin dressed in a black S.S. uniform were waved. A photograph of the Prime Minister's face was placed over an image of the body of the notorious Nazi leader Heinrich Himmler. When a political leader is portrayed as a Nazi it constitutes a call for murder, a hateful incitement to eliminate the most fervent enemy of the Jewish people.[30] In another article I argued that this speech should be excluded from the protection of the Free Speech Principle, and that the authorities were mistaken in not immediately prosecuting those who waved the photomontage.[31] They were prosecuted only after Rabin's assassination.[32] This hateful expression was instrumental in generating an atmosphere of hatred and incitement that was conducive to the assassination of Prime Minister Rabin on 4 November 1995.

As for the role of the media in covering such episodes, Attorney General Michael Ben-Yair's distinction between direct and indirect coverage is

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[28] M. Cohen, *Report to the Minister of Justice of the Special Committee on Hate Propaganda* (Ottawa: Queen's Printer, 1966) at 69.

[29] For further deliberation, see W. Kinsella, "Challenges to Canadian Liberal Democracy" in *Challenges*, *supra* note 17, 119.

[30] It is not suggested that every incitement is a form of hate speech, or that every hate speech necessarily constitutes instigation. It is possible to incite, for instance, a strike, and there are many forms of hate speech that do not necessarily lead to a violent action. In incitement there is assumed to be a direct correlation between the speech and the violent action. The example here, however, is an example of hateful incitement.

[31] R. Cohen-Almagor, "Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination" in R. Cohen-Almagor, ed., *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Ann Arbor: University of Michigan Press, 2000) 79 [hereinafter *Liberal Democracy*].

[32] Criminal file 673/95 of 17 March 1996, judgment delivered by Judge Uri Ben-Dor, Magistrate's Court, Jerusalem.

pertinent.[33] There is a difference between holding live interviews with inciters and printing instigating photos, and covering protests and demonstrations against the government. It is one thing to report about leaders of hate groups and/or instigators, and another to provide them with microphones. In Israeli culture and social context, printing photos showing the Prime Minister in a Nazi uniform is unethical. It is one thing to report that during a demonstration pictures of Rabin dressed in a Nazi uniform were waved and quite another to actually print the pictures in the newspapers, thereby serving the interests of the inciters. The media should not serve as a platform for spreading hatred and violence. Indeed, Moshe Vardi, editor of the major Israeli newspaper, *Yedioth Ahronoth,* applied self-censorship and refrained from printing these pictures. He did not wish to serve the interests of inciters. This is an example of applying ethical self-restraint. Another newspaper, *Ma'ariv,* did not adhere to this ethical standard.[34]

To reiterate, it is *not* argued that the media should not cover incidents of racist manifestations and hate propaganda. The public should be made aware of these phenomena, know about the individuals and groups who preach hate, their motivations and methods. At the same time, it is possible to report about political extremists, their intentions and deeds, in the name of the public's right to know, without playing into the hands of inciters and serving as their loudspeaker. Responsible media are moral media. The setting of limits on the public's right to know should be left in the hands of journalists, but it is important to stress that explicitly inflammatory messages should not be protected

[33] See a letter by Attorney Amir Zolty, Senior Assistant to the Attorney General, to newspaper editors concerning nonpublication of praise for the murder of the Prime Minister and Defence Minister (8 November 1995); D. Meiri & T. Zimuki, "There Exists a Danger of Another Political Murder" *Yedioth Ahronoth* (12 November 1995) 7; Uzi Fogelman, "An announcement from the plaintiff" H.C. 7094/95, *The National Union of Journalists* v. *Attorney General Ben-Yair* (14 December 1995); private discussions with Attorney General Ben-Yair.

[34] One referee noted that likening a Canadian political leader to a Nazi would not direct adherents to assassinate the intended target, nor would it usually justify a prosecution for the promotion of hatred. At most, it would lead to a suit for defamation, as happened recently in Québec. The referee therefore wondered: do different political contexts give rise to differing media responsibility? The answer is "no." This article relates to liberal democracies that accept the two basic values: respect for others and abstention from harming others. Examples may differ from one political culture to another but the rationale remains the same. In the Canadian context, if a rally were to be held preaching hatred against Aboriginal First Nations, portraying them as greedy, lazy, drunk and criminal, the media should not air such a portrayal. Instead, they should indirectly report about the hateful message that categorically and collectively denounces a group of people.

under the Free Speech Principle. Furthermore, it is possible to report demonstrations and protests without printing hateful messages (like photos of Israeli leaders dressed in the black Nazi uniform). Media editors and reporters, acting as responsible citizens in a democracy, should report such occurrences along with an unequivocal and clear condemnation. I shall reiterate this point later on.

Democracy and free media live and act under certain basic tenets of liberty and tolerance, from which they draw their strength and vitality and preserve their independence. Two of the most fundamental values underlining every democracy are respect for others and abstention from harming others.[35] They should not be secondary to considerations of profit or of the personal prestige of journalists and newspapers. Journalists should see people as ends and not as means — a Kantian deontological approach.[36] This view implies the ability to control the media — even when acting in the name of the public's right to know — whenever publication might cause otherwise unjustifiable harm to others. These instances should be distinguished from incidents when the harm is justified.[37] This is what is meant when the media are called "the watchdog[s] of democracy."

The role of the media isn't only to report what "is there" and to "further truth." Along with the power the media possess comes responsibilities to their audience, their profession and to the democracy that enables their functioning.[38] The establishment of powerful press empires in Canada feeds the debate on social responsibility. The debate on ethical boundaries in media coverage is recent — the product of the last two decades or so — and nowadays is very

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[35] R. Dworkin, "Liberalism" in *A Matter of Principle* (Oxford: Clarendon Press, 1985) 181; R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1976); *Boundaries*, *supra* note 14. For further reading and analysis, see R.L. Abel, *Speaking Respect, Respecting Speech* (Chicago and London: The University of Chicago Press, 1998).

[36] See I. Kant, *Foundations of the Metaphysics of Morals* (Indianapolis, Ind.: Bobbs-Merrill Educational Publishers, 1969).

[37] For instance, when a person acts corruptly and there is evidence to prove it, the media are allowed, and even obliged, to look into the issue and bring it to public scrutiny.

[38] I have developed this argument in R. Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave, 2001) [hereinafter *Speech, Media and Ethics*]. For discussion on the basis of free expression theory and its limits, see K. Greenawalt, *Speech, Crime and the Uses of Language* (New York: Oxford University Press, 1989); Home Office, *Report of the Committee on Privacy and Related Matters* (June 1990), Cm 1102; Sir D. Calcutt, *Review of Press Self-Regulation* (London: Her Majesty's Stationary Office, January 1993) Cm 2135.

lively. It revolves around the questions *what* to report, in what priority and in accordance to what standards, as well as *how* to report.[39] It is possible to report about hate-mongers without directly reporting their malicious diatribes.

The further contention of this essay is that the media are not under an obligation to remain impartial or neutral with regard to all concepts: some concepts may coexist with the principles of democracy while others contradict them completely. It is for the media to take a firm stance to defend democracy whenever it is threatened.[40] On this issue my view differs significantly from the views of some commentators and media codes of conduct which speak of "neutral reporting."[41] It is one thing to ask the media to be neutral in their coverage of news. But there is no obligation on the part of the media to adhere to neutrality in editorials and opinion columns. Indeed, columnists often advance partial views, strongly criticize decision-makers and offer remedies and alternative policies. Professional and ethical reporting means, in a nutshell, caring for the consequences of reporting. Where hate speech and Holocaust

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[39] H. Holmes & D. Taras, eds., *Media, Power and Policy in Canada* (Toronto: Harcourt Brace Jovanovich, 1992); N. Russell, *Morals and the Media: Ethics in Canadian Journalism* (Vancouver: University of British Columbia Press, 1994); V. Alia, B. Brennan & B. Hoffmaster, eds., *Deadlines and Diversity: Journalism Ethics in a Changing World* (Halifax, Nova Scotia: Fernwood, 1996); A. Siegel, *Politics and the Media in Canada* (Toronto: McGraw-Hill Ryerson, 1996); R. Lorimer & J. McNulty, *Mass Communication in Canada* (Ontario: Oxford University Press, 1996); J. Winter, *Democracy's Oxygen: How Corporations Control the News* (Montreal: Black Rose Books, 1997); R.A. Hackett & Y. Zhao, *Sustaining Democracy? Journalism and the Politics of Objectivity* (Toronto: Garamond Press, 1998); D. Taras, *Power and Betrayal in the Canadian Media* (New York: Broadview Press, 1999).

[40] See the struggle of the *Times-Picayune* in New Orleans against a bigot named David Duke who wished to become the governor of the state of Louisiana (20 October–17 November 1991 issues). See D.E. Boeyink, "Reporting of Political Extremists in the United States: The Unabomber, the Ku Klux Klan, and the Militias" in *Liberal Democracy*, *supra* note 31, 215. For discussion on the concept of neutrality, see R. Cohen-Almagor, "Between Neutrality and Perfectionism" (1994) 7 Can. J. L. & Jur. 217.

[41] For instance, the Radio/Television News Directors Association code begins by saying: "The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly, and impartially." For further discussion, see G. Gauthier, "In a Defence of a Supposedly Outdated Notion: The Range of Application of Journalistic Objectivity" (1993) 18 Can. J. Comm. 497; R.A. Hackett, "An Exaggerated Death: Prefatory Comments on 'Objectivity' in Journalism" in Alia, Brennan & Hoffmaster, eds., *supra* note 39 at 40; J. McManus, "Who's Responsible for Journalism?" (1997) 12 J. M. M. E. 5.

denial are concerned, such caring prescribes partiality rather than neutrality.[42] Otherwise, impartial reporting might confer legitimacy on racist diatribe and blatant lies.

To substantiate these claims, in the next section I review the issue of hate speech in Canada and how the issue has been addressed by the media and by the courts.

II. HATE SPEECH IN CANADA

During the late 1930s a good deal of hate material was distributed across Canada. Most of the propaganda was anti-Semitic in nature, stressing such themes as "Communism is Jewish." Much of the activity centred around two people, Adrien Arcand and John Ross Taylor. Arcand was the founder of the National Unity Party in Québec, while Taylor was active in Toronto. Both were interned during World War II. Both resumed their hate operations after the war.[43]

In its conclusions, the Special Committee on Hate Propaganda in Canada (the Cohen Committee) said that although the hate situation in Canada was not alarming, clearly it was serious enough to require action: "The Canadian community has a duty, not merely the right, to protect itself from the corrosive effects of propaganda that tends to undermine the confidence that various groups in a multicultural society must have in each other." The committee therefore recommended that the government take action in fighting against hate propaganda.[44]

The emergence of Ernst Zundel in the 1980s evoked a lot of attention in political, legal and media circles. The media covered Zundel's trial for

[42] It is suggested that Holocaust denial is a form of hate speech for what is the essence of such denial? The claim that is often made is that Jews invented this fascinating story to blackmail nations, to exploit others for their own purposes. The Holocaust is the product of partisan Jewish interests, serving Jewish greed and hunger for power. The Holocaust invention serves the Jewish conspirators ("elders of Zion") who wish to control and manipulate the world. These contentions are not innocent. Instead, these are contentions of hate. They are designed to evoke resentment against the Jewish people, and to trigger hate against Jews wherever they are.

[43] Reprinted from the Cohen Report in M. Cohen, "Hate Propaganda in Canada" in B.D. Singer, ed., *Communications in Canadian Society* (Toronto: Copp Clark, 1975) 342 at 343.

[44] *Ibid.* at 361.

distributing hate literature,[45] making the trial a media event.[46] The main personality, the defendant, did what he could to capture media attention. His hard hat, his short controversial quotes and his staged appearances were a recipe for camera exposure. He persuaded himself and many others that he was a master manipulator of the media. *Media Tactics I* and *Media Tactics II* were the titles of instructional audio tapes produced by the defendant and available for purchase during the course of the proceedings. Commentators and experts discussed at length how the media coverage would affect the Canadian public's beliefs about Nazism, the Holocaust, the justice system and Jews. The trial received an exceptional amount of media attention.[47]

To understand the train of thought of many of the columnists, let me quote from the writings of Barbara Amiel Black, a well-known political columnist for *Maclean's* magazine:[48]

> It is a popular assumption that the prosecution of Zundel and the upcoming prosecution of Alberta teacher James Keegstra on similar charges are necessary in order to prevent the development of a climate that could lead to a new Third Reich ... Hitler was right, alas. You either have free speech for everyone or you do not have free speech. You cannot have a little free speech or free speech 'except for'.

Black maintained: "What all the people who support the prosecutions of the Zundels and Keegstras don't understand is that limiting free speech creates the conditions for the rise of Hitler or his equivalent. The problem with freedom is that it is indivisible."[49]

This liberal point of view is extremely sweeping and, at the same time, naive and false. As was said at the outset, freedom of speech and, indeed, any freedom, is not indivisible. Freedom of speech can inflict a lot of harm. It is not an absolute value that should be protected no matter what. Black's reasoning put a lot of emphasis on the positive consequences of fighting speech with more speech, and very little — if any — attention is given to the harmful consequences of such speech. Hate speech calls for the discrimination of certain

[45] See E. Kallen & L. Lam, "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience" (1993) 25 Can. Ethnic Stud. 9.

[46] On the concept of media events, see D. Dayan & E. Katz, *Media Events* (Cambridge, MA: Harvard University Press, 1992).

[47] G. Weimann & C. Winn, *Hate on Trial* (Oakville, Ont.: Mosaic Press, 1986) at 83.

[48] B.A. Black, quoted in M. Barlow & J. Winter, *The Big Black Book* (Toronto: Stoddart, 1997) at 110.

[49] *Ibid.*

people, denying their right to equal protection and treatment as citizens in a democracy. As premised earlier, it inflicts on its target emotional and psychological suffering, humiliation and distress; sometimes it also evokes intimidation and fear.[50] Hate speech might also instigate violence against the target group. Furthermore, hate speech may generate a certain discriminatory atmosphere against the target group. It might silence a minority and exclude its members individually and as a group from communicative interaction and from integration into society.[51] When we are faced with questionable speech and ask ourselves whether there is reason to stop it, we need to examine four criteria: the content of the speech, its manner, the intention of the speaker and the circumstances. As I showed elsewhere,[52] when the content and manner of the speech are significantly harmful, the intent to inflict suffering on a designated target group, and the circumstances such that they make the speech's harm inescapable, then there are grounds to restrict free speech.

Obviously, Black does not share this view. She does not think that we need to review anything but simply grant unqualified protection to freedom of speech. By pursuing this reasoning, she and like-minded journalists gave publicity and even credence to the views of Holocaust deniers and hate-mongers. A York University historian, Ramsay Cook, was quoted as saying: "Those people who denied the Holocaust were given the same objective treatment as the others so it sometimes appeared in the newspapers that this was really a matter that was open to question."[53] The media should, of course, cover the trial and the phenomenon but, at the same time, they should also condemn the man and his

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[50] Further harms include feelings of isolation and self-hatred. See R. Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Harv. C.R.-C.L. L. Rev. 133 at 137. See also K. Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton, N.J.: Princeton University Press, 1995) at 47–70.

[51] Kübler, *supra* note 11 at 367; J. Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Boulder: Westview, 1999) at 127–35. For further discussion, see M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320.

[52] For elaborate reasoning, see R. Cohen-Almagor, "Harm Principle, Offence Principle, and the Skokie Affair" in S.J. Heyman, ed., *Controversies in Constitutional Law*: *Hate Speech and the Constitution,* vol. 2 (New York & London: Garland Publishing, 1996) 277, reprinted from (1993) 41 Pol. Stud. 453.

[53] Professor Cook was quoted by M. Polanyi, "Holocaust Fact, Historians State" *Globe and Mail* (30 May 1985) A11. Also in N. Russell, *supra* note 39 at 26. Interview with R. Cook, General Editor, *Dictionary of Canadian Biography*, University of Toronto (1 October 1998).

views in editorials and opinion columns, trying to analyze the framework within which Zundel operates, and pursue the question as to whether the liberty to hate is a liberty that should be safeguarded under the Free Speech Principle. At any rate, denying the Holocaust is not simply offering "another truth" in the free marketplace of ideas,[54] it is a method of provoking hatred against Jews. Hate-mongers should be looked at as the enemies of democracy and not as people who offer a credible interpretation of history. After all, not all people are "reasonable people." Not all people accept the Holocaust as an indisputable historical fact. Zundel directed his hate speech especially towards young, impressionable minds. He urged them not to accept commonly accepted views without question, appealing to their rebellious nature. When the media cover Zundel's views without qualification, presenting him as a legitimate thinker who is offering his truth in the free market of ideas, the media provide him with a convenient platform from which to mislead people and to rewrite history, and confer onto his views undeserved legitimacy.

In his study of how the Canadian media cover hate propaganda, Warren Kinsella argues that in the *Keegstra* case (discussed below) the Albertan and national news media generally provided good coverage of the issues and personalities involved in the prosecution of the former high school teacher. In the Zundel trials, a less satisfactory approach was taken, with the media providing the pro-Nazi with what he called "one million dollars' worth" of free publicity.[55] Kinsella contends that in their coverage of the first Zundel trial, the willingness of Canadian reporters and editors to provide an uncritical platform for a parade of Holocaust-denying witnesses was shameful. In the process, the Canadian media gave a far wider circulation to the Holocaust-denying propaganda than Zundel had been able to achieve on his own. After a period of self-analysis and debate, the news media in Canada employed a different approach for Zundel's second trial, with some of them electing to give it very little, if any, prominence.[56]

Having said that, Weimann and Winn argue that the first Zundel trial gave the general public a greater awareness of and sensitivity to Holocaust denial. They

[54] For a critique of the "free marketplace of ideas" concept, see J. Pole, "Freedom of Speech: From Privilege to Right" in *Challenges*, *supra* note 17, 11.

[55] W. Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper Collins, 1995) at 422. Interview with W. Kinsella (2 October 1998).

[56] Kinsella, *supra* note 29. For further discussion on the Zundel trials, see L. Douglas, "The Memory of Judgment: The Law, the Holocaust, and Denial" (1996) 7 History and Memory 100.

maintain that the media balanced their apparently neutral reporting of Holocaust denial with significant exposure for Holocaust survivors testifying at the trial and with extensive reporting on the Holocaust outside the context of the trial. Media users had opportunities to learn the facts of the Holocaust outside the context of the trial itself. Viewers of television and readers of the press could decide for themselves if the Holocaust had ever taken place.[57]

It is reiterated that the media should not treat hate-mongers in a neutral fashion. In support, I recall some statements made by another professional agent of democracy, the courts, in dealing with hate speech. There are significant similarities between the courts and the media. Both are oriented to public questions. Both are expected to safeguard democracy and have a sense of social responsibility.[58] Both are professions in which a central activity is writing. Writing judgments and writing pieces for the media are rather specific. They are different from scientific professions, where the central activity is to arrive at "lawful" generalizations.[59] Both the media and the courts can drastically affect people's lives. Of course, there are also major differences that distinguish the courts from the media: (1) while the courts' role is to mete out justice, the role of the media is to inform and report; (2) the neutrality of judges is institutionally protected by their removal from the political and economic arenas, whereas media organizations operate within the market, are profit oriented, and some of them take an active part in politics. Even the publicly funded or regulated radio and TV channels are not free from the need to monitor audience ratings; (3) reporters need not have any formal qualifications to work in the media, whereas judges are required to study, pass exams and excel in law before being appointed to the bench; (4) in most cases, judges have relatively long periods of time to ponder before rendering their judgments, whereas news is a perishable commodity and must be hastily assembled;[60] (5) while the courts are

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[57] Weimann & Winn, *supra* note 47 at 105.

[58] The 1947 Report of the Commission on Freedom of the Press, headed by Robert M. Hutchins and entitled "A Free and Responsible Press," is the chief source of the idea that has dominated discussion of journalism ethics for more than fifty years — the concept of the social responsibility of the press. For further discussion, see E.B. Lambeth, *Committed Journalism* (Bloomington, Ind.: Indiana University Press, 1992); C.G. Christians, J.P. Ferré & P.M. Fackler, *Good News* (New York: Oxford University Press, 1993); *Speech, Media and Ethics*, *supra* note 38 at 69–104.

[59] M. Schudson, *Origins of the Ideal of Objectivity in the Professions* (New York and London: Garland Publishing, 1990) at 28, 231–95.

[60] For further discussion, see K. Newton, "Neutrality and the Media" in R.E. Goodin & A. Reeve, eds., *Liberal Neutrality* (London & New York: Routledge, 1989) 131.

governmental agents, the media in democracies generally are not. Nevertheless, it is emphasized yet again that both should be committed not to the partisan interests of this or that government but to the inherent values of democracy.

Having acknowledged these major differences, my claim remains that the media, like the courts, have an important role to play in safeguarding democracy. The media need not remain neutral when values and institutions of democracy are threatened and attacked. Journalists are also citizens. Theodore Glasser[61] notes that one of the unfortunate consequences of the view of objective reporting is that it denies journalists their citizenship: as disinterested observers, as impartial reporters, journalists are expected to be morally disengaged and politically inactive.[62] This consequence is, indeed, unfortunate. Ethical journalism, in the sense of caring for individuals as human beings, caring for democracy and showing responsibility with regard to what one writes, is more important than the notion of moral neutrality that is embedded in the technique of objective reporting.

However, two criticisms could be made against this line of reasoning. First, as Eugene Volokh claims in his remarks on a draft of this essay, some members of the public will begin to sympathize with hate groups because they'll stop trusting the media's criticisms. Second, some reporters believe that all they need to do is to report the story and let the public, who are able to differentiate between right and wrong, use their judgment. What is required from them is to report the facts in a so-called "objective" manner. Let me say something about these criticisms.[63] Hate speech is not like any other matter that should be covered in an objective tone. It is not like any other piece of news: road accidents, the death of the Princess of Wales, the flooding of the rice fields or raising taxes. All humane people conceive of hatred of other groups — whether these are religious, cultural, national or racial minorities — as immoral, wrong, wicked and odious. People who care about the underlying values of democracy, respecting others and not harming others, may feel that the media's condemnation of hate speech is redundant, expressing the obvious, but they will not grow sympathetic to hate-mongers only because the media condemned hatred. Nor do I think that these citizens will mistrust the media on the sole ground that the media see it as their

[61] T.L. Glasser, "Objectivity Precludes Responsibility" [1984] The Quill 15.

[62] Glasser cites Walter Cronkite, who said: "I don't think it is any of our business what the moral, political, social, or economic effect of our reporting is. I say let's go with the job of reporting — and let the chips fall where they may." *Ibid.* at 16.

[63] I am paraphrasing statements made in another essay, "Objective Reporting in the Media: Phantom Rather than Panacea" in *Speech, Media and Ethics, supra* note 38, 69.

obligation to fight hatred against people. People on the whole would accept the media's expressed and explained rationale about why they are duty bound to denounce hate speech.

Furthermore, people who believe in democracy's underlying values also think that the media's view of hate speech is correct; in this case, for example, people might be sufficiently confident to say that they know that the media's views are true and, further, that those who disagree are terribly mistaken. Moreover, people think that their opinions are not just subjective reactions to the ideas of disrespect, discrimination and hate against others, but reflections of their own moral character. Following Dworkin, I would say that people think that it is an objective matter — a matter of how things really are — that hate speech is wrong and wicked. The claim that hate speech is objectively wrong is equivalent to the claim that hate speech would still be wrong even if no one thought it was. That is another way of emphasizing that hate speech is plainly wicked, not wicked only because people think it is.[64]

In this respect, the media might learn from the courts when dealing with hate speech. James Keegstra, a high school teacher, was convicted for describing Jews in his classes as "treacherous," "money-loving child-killers" and "sadistic."[65] He was convicted under section 319(2) of the Canadian *Criminal Code*, which outlaws public communications that wilfully promote hatred against any identifiable group. Chief Justice Dickson, who delivered the opinion of the Court, said that hate propaganda seriously threatened both the enthusiasm with which the value of equality is accepted and acted upon by society and the connection of target group members to their community. The Court depicted Keegstra as inflicting injury on his target group, the Jews, and as striving to undermine worthy communal aspirations. The language used by the Court to describe Keegstra was far from neutral or objective. Chief Justice Dickson explicitly stated that there could be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Keegstra: it was deeply offensive, hurtful and damaging to target group members, misleading to his listeners and antithetical to the furtherance of tolerance and understanding in society. Those who promoted hate speech were described as "hate mongers" who advocated their views with "inordinate vitriol." Their aim was to "subvert" and "repudiate" and "undermine" democracy, which they did with "unparalleled vigour." Since their ideas were "anathemic" and "inimical"

[64] R. Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25 Phil. & Pub. Aff. 87 at 92–98.

[65] *Keegstra, supra* note 18.

to democracy, the Court viewed them with "severe reprobation." Chief Justice Dickson asserted that expressions can work to undermine Canadians' commitment to democracy when employed to propagate ideas anathemic to democratic values. Hate propaganda worked in such a way, arguing as it did for a society in which the democratic process was subverted and individuals were denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity was thus wholly inimical to the democratic aspirations of the free-expression guarantee. In this manner, the Court characterized Keegstra as an enemy of democracy who did not deserve the right to free speech to undermine fundamental rights of others.[66] The media should treat racists in a similar fashion.

Finally, let me make the following observations. First, it is interesting to note that the big hate trials in Canada were covered unevenly in the different provinces. *Keegstra* and *Zundel* were big stories in Ontario and Alberta, but attracted far less interest in the other provinces. Marcel Pepin, ombudsman of Radio Canada, says that nobody knows Zundel in Québec.[67] This view coincides with Weimann and Winn's study, which found differences in the coverage of the trial by the English and French media. They argued that the differences in the coverage paralleled the differences in the attitudes of English and French Canadians towards Jews. The English press and television provided much more coverage of the trial and much more coverage of the Holocaust outside the context of the trial. The English media (except for Newfoundland) provided extensive coverage of nonviolent Jewish events while the French media provided essentially no such coverage. Jews in French news were portrayed almost exclusively in the context of victimization.[68]

Second, as Warren Kinsella observed, the attitude of the media toward hate speech during the 1990s has changed. Conrad Winn argues that the 1980s were the heyday of media coverage of hate speech. He maintains that the media were neutral in their coverage and that Zundel made people become anti-German

[66] *Ibid.* at 763–69. See also M. Moran, "Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" (1994) 6 Wisc. L. Rev. 1425; R. Moon, "The Regulation of Racist Expression" in *Liberal Democracy*, *supra* note 31, 182. See also E. Kallen & L. Lam, "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience" (1993) 25 Can. Ethnic Stud. 9.

[67] Interview with M. Pepin (22 September 1998). On anti-Semitism in Quebec, see M. Shain, *Antisemitism* (London: Bowerdean, 1998) at 60–83; M. Richler, *Oh Canada! Oh Quebec! Requiem for a Divided Nation* (New York: Knopf, 1992).

[68] *Supra* note 47 at 164. See also *ibid.* at 105.

because he claimed to be speaking in the name of the German civilization.[69] Similarly, David Lepofsky, of the Ministry of the Attorney General in Ontario, argues that there was less coverage of hate speech trials and literature during the 1990s than during the 1980s because of the outcry and criticism regarding the extensive coverage during the 1980s. In the 1990s, the media refrained from quoting Zundel's expert witnesses who said that there was no Holocaust. They covered those statements during the 1980s.[70] And Mel Sufrin, executive secretary of the Ontario Press Council, says that the major Toronto-based newspaper, the *Toronto Star*, was tired of covering the "ridiculous stories of Zundel" in the second case of 1992.[71]

Third, the Canadian Broadcasting Corporation (CBC) is now far more hesitant to cover Zundel. David Bazay, ombudsman of the CBC, contends that Zundel is not news anymore. He maintains that the CBC broadcast Zundel enough, paying far too much attention to someone who did not deserve it. Bazay states: "We provided him with too much publicity and at some point we said enough is enough. The issue was exhausted."[72]

James Littleton, a producer at the CBC, supports these contentions. He says that, in principle, Zundel is not welcome on CBC programs. Littleton states that Zundel was invited once and "it was a mistake." The incident involved the president of Holocaust Survivors, who was invited to speak. Zundel called and asked to be interviewed for the sake of balance. Littleton reiterates that this mistake was never repeated.[73] He acknowledges that the invitation to "counter-balance" a Holocaust survivor conferred Zundel unjustified legitimacy and portrayed him as one whose "truth" should be heard, placing him on an equal footing with someone who described what happened to him in Europe during the Nazi period.

This mistake is a real concern. Today, when one searches the Internet using the term "holocaust," one receives information on the Holocaust and also on Holocaust denial. Young people might be confused between the two "truths"

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[69] Interview with Professor Conrad Winn, Chairman, "Compas," and Department of Political Science, Carleton University (28 September 1998).

[70] Interview with M. David Lepofsky, Ontario (3 October 1998).

[71] Interview with Mel Sufrin, Toronto (6 October 1998).

[72] Interview with David Bazay, Ombudsman, Canadian Broadcasting Corporation, Toronto (6 October 1998).

[73] Interview with James Littleton, Canadian Broadcasting Corporation, Toronto (4 October 1998).

offered to them, not knowing which "truth" they should believe. As skeptical thinkers, they might come to think that *the* "truth" lies somewhere between the two proposed "truths," that there is some "truth" in the one view and some "truth" in the other. This trend is especially worrisome in light of the following considerations: within a few years there will not be any Holocaust survivors among us; the sites launched by hate-mongers are graphically compelling; and the media's inclination to balance between views. This unqualified inclination in the name of objective reporting might lead to future such mistakes, balancing between a historian who probes the horrors of the Nazi racist constitution and the subsequent mass murders, and a revisionist historian who refutes that any of the harsh consequences of racial hatred actually took place. If such a mistake could have been made by the CBC before the end of the twentieth century, when Holocaust survivors are required to hear that they are imagining and lying in order to exploit Germany and other countries, what will happen in another fifty years when the horrors of World War II become yet another historical phenomenon, remote from living generations?

Fourth, some people think that hate speech cases show how healthy the debate about freedom of speech in Canada is.[74] The debate focuses public attention on the rationale for free speech and on its limits. Canada did not become either a more racist society or a less tolerant society because of the hate speech cases. It would be hard to prove, for example, that the degree of racism in a society correlates to the degree of control of free speech. Contrasting the character and extent of racism in the United States and Canada and correlating this with each country's quite different views of limitations on hate speech would suggest that the absolute legal protection of free speech does not provide the salvation usually thought to result. This is the opinion of Professor Roderick A. Macdonald, president of the Law Commission of Canada. In his view, the vast majority of law professors in the United States have a rather absolutist view of freedom of expression. Their view is the result and reflection of the dominant First Amendment tradition.[75] Black law professors and female law professors

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[74] Lee Bollinger has argued that the debate over hate speech has a positive contribution to the shaping of more tolerant society. See L. Bollinger, *The Tolerant Society* (Oxford: Clarendon Press, 1986), especially at 197–200.

[75] Upon ratification of the CERD and CCPR mentioned in *supra* notes 15, 16 and accompanying text, the United States attached reservations to both of them, saying that neither article 4 of CERD nor article 20 of CCPR could "authorize or require legislation … by the United States that would restrict the right of free speech … protected by the Constitution and the laws of the United States." See also Kübler, *supra* note 11 at 357. On the making of the American tradition, see S. Walker, *Hate Speech* (Lincoln: University of Nebraska Press, 1994) at 9–16. The American free speech tradition is illustrated in J.B.

would, however, be proportionally over-represented among those professors who favour limitations on freedom of expression.[76] In Canada, a majority of law professors would uphold limitations on hate speech. Macdonald believes that this willingness to limit hate speech does not correlate with individual socio-cultural traits. For example, as many non-Jewish law professors as Jewish law professors would take an anti-absolutist position. There is a shared belief that one should be on guard against those who seek to polarize public opinion on racial grounds.[77]

Indeed, Canadian criminal law is far more extensive on prevention of hate speech than is American criminal law. In both cultures diversity is believed to be a good thing. In both cultures minorities are encouraged to speak and express opinions. But in Canada it is recognized that hate speech builds on differences and targets minorities for hatred. Hate speech destroys the mosaic that is so important for Canadian identity.[78]

Jacobs & K. Potter, *Hate Crimes* (New York: Oxford University Press, 1998), especially at 145–53. For lessons to be distilled from examination of free speech law in the United States and Canada, see Greenawalt, *supra* note 50 at 150–54.

[76] This is because many feminists perceive pornography as a form of hate speech. They argue that pornography falls outside the protection of the First Amendment because it is not merely an idea but rather a practice of subordination, the essence of sexist social order, its quintessential social act. See C. MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987) at 148–54. See also C. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993); A. Dworkin, *Pornography: Men Possessing Women* (New York: Perigee, 1981).

[77] Interview with Professor Roderick A. Macdonald, Ottawa (25 September 1998). For further deliberation on the Canadian viewpoint, see R. Moon, "Drawing Lines in a Culture of Prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C. L. Rev. 99; R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U.T.L.J. 419; J. Magnet, "Hate Propaganda in Canada" in W.J. Waluchow, ed., *Free Expression* (Oxford: Clarendon Press, 1994) 223 [hereinafter *Free Expression*]; W. Sumner, "Hate Propaganda and Charter Rights" in *Free Expression*, 153; A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can. J.L. & Juris. 111; I. Cotler, "Holocaust Denial, Equality and Harm: Boundaries of Liberty and Tolerance in a Liberal Democracy" in *Liberal Democracy*, *supra* note 31, 151.

[78] For further discussion of the social and legal aspects of hate propaganda, see F.M. Lawrence, *Punishing Hate* (Cambridge, MA: Harvard University Press, 1999); J. Weinstein, "An American's View of the Canadian Hate Speech Decisions" in *Free Expression*, *supra* note 77, 175; Abel, *supra* note 35 at 14.

The most recent Zundel controversy concerns the hateful websites he operates in California. Section 13(1) of the Canadian Human Rights Act holds:[79]

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Consequently, Zundel was unable to continue disseminating his hateful propaganda via the Internet and was forced to move his site to the United States. Civil proceedings were opened before the Canadian Human Rights Tribunal alleging violation of section 13(1) of the *Canadian Human Rights Act*. One of the attorneys involved in the legal proceedings against Zundel, Mark Freiman, explained that the prosecution had expert evidence to show that Zundel was using telephone lines to operate the Californian site. This is, of course, a very contentious issue. Zundel contests the view that he is operating the site from Toronto. Freiman, however, thinks it can be proven that Zundel is the one who is communicating; that he is communicating "telephonically"; that he is using Canadian telecommunications facilities in whole or in part; and that his communications are likely to expose an individual or a group to hatred or contempt based on their membership in an ethnic group. If the Tribunal accepts the evidence that was presented and does not dismiss the complaint on procedural grounds, there will be a basis for finding that Zundel has committed a violation of section 13(1) of the *Canadian Human Rights Act*. What Zundel says is likely to expose Jews to contempt.[80] The desired remedy is to make an order against Zundel to discontinue operating the site.[81]

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[79] *Canadian Human Rights Act*, R.S.C. 1985, c. H–6; The *Act* supplements the hate provisions of the *Criminal Code*, R.S.C. 1985, c. C–46.

[80] Interview with M.J. Freiman, McCarthy Tetrault, involved in some hate speech cases, Toronto (6 October 1998); telephone conversation with Freiman (13 March 2000). I also benefited from conversations with Richard G. Dearden, expert on media law, Gowling, Strathy & Henderson, Ottawa (29 September 1998), and Martin Freeman, Director and General Counsel, Department of Justice, Constitutional and Administrative Law Section (14 March 2000).

[81] For further deliberation on the calculus of harm when the risk increases as a result of the sheer number of people exposed to harmful messages, see C.R. Sunstein, *One Case at a Time* (Cambridge, MA: Harvard University Press, 1999) at 191–97.

III. CONCLUSION

The freedoms that the media enjoy in covering events are respected as long as they do not oppose the basic values that underlie the society in which they operate: not harming others and respecting others. This issue becomes especially complicated when the media cover hate speech that, by definition, espouses the opposite principles — harming others and disrespecting others. It is not suggested that the media should ban hate speech. Whatever the reader might think about legal restrictions on bigoted speech, we should all agree that the media have a social responsibility far beyond the legal one to cover hate speech in a responsible and ethical manner. If the public believes that the government may not stop people from spreading hateful messages and propaganda, it becomes *even more* important for the public to urge powerful private institutions to adopt some ethical principles in their reporting of this troublesome phenomenon. The media should be called upon to condemn hate speech when they report it, rather than cling to neutral reporting. Freedom of speech is a fundamental right, an important anchor of democracy, but it should not be used in an uncontrolled manner. Unlimited liberty and unqualified tolerance might deteriorate into anarchy and lawlessness. In such an atmosphere, democracy would find it quite difficult to function and the media would be one of the first institutions to be undermined.

In their coverage of Holocaust denial, the Canadian media wrongly assumed that their viewers and readers were autonomous, rational adult beings who were capable of independently making up their own minds. They wrongly strove towards moral neutrality by providing equal footing to Holocaust survivors and Holocaust deniers. The assumption was wrong, not only because not all people are rational beings, but also because the media's audience includes children. Social responsibility requires the media to bear in mind that a substantial percentage of their consumers are youths, whose intellects are at a formative stage. The drive towards neutrality was wrong because it lacked sensitivity to Holocaust survivors and provided credence and legitimacy to a brute lie, the aim of which was, and still is, to provoke hostility towards Jews by claiming that they are blackmailing the world by spreading distorted stories about events that never happened.

Culture, Nonsense and Rights: Contemplating the *Human Rights Act*

Rights and Democracy: Essays in U.K. – Canadian Constitutionalism

by G. Anderson, ed., (London: Blackstone Press, 1999) pp. 276

Reviewed by Ian Ward

"Nonsense on stilts," Jeremy Bentham famously observed on hearing Sir William Blackstone expound his theory of natural rights in a London lecture hall. Commenting on England in the late 1760s, Blackstone concluded that "[e]verything is now as it should be." No, it was not, Bentham rejoined. Everything was a shambles, the law a chaotic mess, the subjects of His Majesty rioting in England and rebelling in America. What England needed, as a matter of urgency, was constitutional reform.[1] In 1997, the U.K. elected a new Labour government with precisely this mandate, to reform the constitution. As part of this package, it has enacted a *Human Rights Act*, which from October 2000 has incorporated much of the European Convention on Human Rights into domestic law.[2]

Bentham would have been horrified. Rights-talk, he averred, leads to endless, debilitating metaphysical "gossip," the articulation of "superstitious fancy" and the advocacy of rival "splenetic deities." Advocates of fundamental rights, men such as Tom Paine or William Godwin, dealt "in sounds instead of sense, in caprice instead of reason, in darkness instead of light." Their intellectual supplicants, those who engineered revolutions in America or France, advanced the cause of "anarchy" rather than democracy, of "license" rather than "liberty."[3] What England did not need is more rights, more nonsense. What it needed was genuine legal and political reform. He would undoubtedly have said the same today.

It seems the culture, which was cast by the likes of Bentham and Edmund Burke, and later by Bagehot and Dicey, has been overcome. "Something is happening," according to Helena Kennedy, "a different *Zeitgeist*, a shift in the legal tectonic."[4] Translating the central concept, Francesca Klug refers to a "new spirit of the age."[5] The British, it appears, distrust rights no longer. Indeed, they cannot get enough of them: a new *Human Rights Act* in October 2000, a new European Union *Charter of Fundamental Rights* just two months later. Suddenly, the U.K. is awash with rights. Though not, perhaps, with rights-talk. For no one, it seems, has seen fit to let the British people know of this jurisprudential and cultural sea-change.

But why has the U.K. allowed itself to be so readily seduced, after centuries of resisting the wiles of right? What has happened? What does the future hold? Is it an affair that is destined to end in tears?

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1. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Methuen, 1982) at xxxvii, 4, 11–14, 17–20, 26, 31.
2. The Convention was already in large part incorporated into Scots law; see *Scotland Act 1998*, 1998, c. 46, s. 29.
3. *Supra* note 1 at 11–14. Bentham expressly addressed the political implications of rights-talk in his condemnatory commentary on the French Revolutionary Declaration, *Anarchical Fallacies*. For a discussion of the context of Bentham's critique, see I. Ward, *A State of Mind?: The English Constitution and the Popular Imagination* (Stroud: Sutton, 2000) at 128–53.
4. H. Kennedy, "Introduction" in F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000) xi.
5. F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000) at 6–7.

In *Rights and Democracy: Essays in U.K. — Canadian Constitutionalism*, a number of academic commentators seek to address this question; some by presenting the comparative experiences of the Canadian *Charter*, others by speculating more immediately upon the British *Human Rights Act*, and its immediate cultural context. In essence, what *Rights and Democracy* does is present a story of the Canadian experience of a charter of rights and then, from this story, suggest prospective histories for the *Human Rights Act*.

The purpose of this review article is to continue this story-telling. The first part will examine the various alternative histories of the Canadian *Charter*, presented in *Rights and Democracy* and elsewhere. The second part deals with the particular story of the British *Human Rights Act*. Part three continues this latter history, presenting an alternative story of the *Human Rights Act*; one that is cast in the particular light of European legal and political integration. The article concludes by suggesting the extent to which the rather different and particular stories of rights in Canada, the U.K. and Europe may indeed be able to furnish a credible prophesy for the future of the *Human Rights Act* and chart the prospects for the evolution of an essential 'culture' of human rights.

The Story of *Charter* Rights

That the theory of law is nothing more than "story-telling," that its narrative is founded on nothing deeper than metaphor and conversation, has inspired a number of contemporary critical legal theorists. Among the most enthused is Allan Hutchinson, who suggests that we "are never not in a story." Echoing Richard Rorty's assertion that politics can be reduced to, and elevated by, mere "conversation," Hutchinson emphasizes that such "conversations about these narratives are themselves located and scripted in deeper stories which determine their moral force." "Most importantly," he avers, "it is the stories themselves that come to comprise the reality of our experience." In jurisprudential terms, it is "legal stories" which "mediate our engagement in the world and with others." It is they that "provide the possibilities and parameters for our self-definition and understanding." Ultimately, the "life of the law is not logic or experience, but a narrative of world-making."[6]

It is perhaps no coincidence that Hutchinson is one of the more virulent of critics of the Canadian *Charter*.[7] A mistrust of meta-narratives, of narratives that claim to do more than merely tell stories, oscillates towards a distrust of ideologies or charters which seek to affirm any deeper legitimacy by articulating certain 'fundamental' truths or rights. In his contribution to *Rights and Democracy*, he argues that the Canadian experience of rights has been wholly counter-productive, at least in terms of facilitating genuine democratic government. Early glimpses of a progressive judicial radicalism in the Supreme Court have been replaced by a conservative complacency — one which has only served to entrench the power of various political and economic elites, most obviously corporations and their stakeholders. The story of the Canadian *Charter*, as told by Hutchinson at least, is one of seeping disillusion, of excited intellectual "chatter" giving way to a pervasive academic melancholy.[8]

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6. A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988) at 13–14.
7. See A. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) for an uncompromising critique of the *Charter*.
8. A. Hutchinson, "The Supreme Court Inc: The Business of Democracy and Rights" in *Rights and Democracy* 29 at 31–34, and also 40–43, discussing the case of *R.J.R.-MacDonald Inc.* v. *Canada* as an exemplar of the tendency of the *Charter* to furnish 'rights' that corporations can exercise against the wider public interest.

Disillusion is not universal. At times, commentators have enthused greatly about the *Charter*'s ability to promote an "engaged constitutional politics."[9] Yet the weight of commentary tends towards the melancholic.[10] At an extreme, Terence Ison has condemned the *Charter*'s "dismal record" as a supposedly empowering statute.[11] And there is an evident sense of melancholy in David Beatty's contribution to *Rights and Democracy*, a tangible regret that the Supreme Court, mindful of the injunction articulated in section 1 of the *Charter*, has reduced ensuing "rights" to little more than "standards" of "rationality" and "proportionality." After an "initial flurry of activity," he concludes, the Court has "adopted a highly deferential, even submissive posture" before government.[12]

Not surprisingly, the Supreme Court's struggle to balance individual and community interests in relation to the kind of equality rights articulated in section 15 has attracted critical commentary. Beatty dwells on the section's "dramatic demise."[13] Even the more laudatory Kathleen Mahoney is inclined to stress the beneficial "strategic" value of section 15 within a wider political context. The history of section 15, which she charts in *Rights and Democracy*, describes something of a roller-coaster journey towards the "egalitarian" ideal. Her conclusion is suitably sober, suggesting that a series of regressive cases — *Egan*,[14] *Miron*[15] and *Thibaudeau*[16] — shows that "progress towards substantive equality" achieved elsewhere "could as easily come to signify nothing."[17]

A similarly ambiguous story is told in other contributions to *Rights and Democracy*. Keith Ewing identifies the difficulties encountered by labour associations trying to establish rights to strike.[18] Similarly, Gavin Anderson's discussion of case law relating to section 2 reveals "sharp disagreement" as to the meaning of freedom of expression, revealed in notorious cases such as *Keegstra*,[19] *Zundel*[20] and *Irwin Toy* v. *Quebec*.[21] His conclusion, like Mahoney's, is that such a right cannot be left to the vicissitudes of constitutional courts, but must be seen as part of a wider political and cultural aspiration.[22]

There is an implication written into the very existence of *Rights and Democracy*. Or at least there is an implicit question: are there lessons to be learned from the Canadian experience of introducing a charter of rights? The answer largely depends upon the extent to which the story of the Canadian *Charter* is particular. Hutchinson's critique, while founded on a particularist approach to jurisprudence and a denial of meta-narratives, is itself universalist. It seeks to deny the pretensions of rights-talk wherever it may occur precisely because rights are set within

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9 R. Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" [1996] Public Law 104 at 105.

10 See *ibid.* at 105; and R. Abella, "A Generation of Human Rights: Looking Back to the Future" (1998) 36 Osgoode Hall L. J. 597 at 601.

11 T. Ison, "A Constitutional Bill of Rights — The Canadian Experience" (1997) 60 Mod. L. Rev. 499 at 511. See also J. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997" (1999) 37 Osgoode Hall L. J. 620, concluding at 628 that the Supreme Court has settled into a "moderately activist" role.

12 D. Beatty, "The Canadian Charter of Rights: Lessons and Laments" in *Rights and Democracy* 3 at 3–4, 9, 21.

13 *Ibid.* at 16.

14 *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

15 *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

16 *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

17 K. Mahoney, "Charter Equality: Has it Delivered?" in *Rights and Democracy* 95 at 95–96, 102–22.

18 K. Ewing, "The Charter and Labour: The Limits of Constitutional Rights" in *Rights and Democracy* 75 at 75–77.

19 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

20 *R.* v. *Zundel*, [1992] 2 S.C.R. 731.

21 *Irwin Toy Ltd.* v. *Quebec*, [1989] 1 S.C.R. 927.

22 G. Anderson, "Understanding Constitutional Speech: Two Theories of Expression" in *Rights and Democracy* 49 at 51–54.

particular "social practices"; in the modern context, this is the liberal democratic vision of society, one which champions "rampant universality, rigorous abstraction and splendid isolation." Accordingly, the hazards that have been encountered in Canada are just as likely to afflict the British *Human Rights Act*. They are endemic to abstract legalistic charters of so-called 'fundamental' rights.[23]

The less sceptical critiques of rights are, in terms of the same paradox, less universalistic. They seek to suggest that the Canadian *Charter* has served as a politically progressive instrument. Kathleen Mahoney's article, speaking for a particular interest — progressive feminism — falls into this category. A similar conclusion can be drawn from Ines Molinaro's discussion of the impact of the *Charter* in Québec. Dismissing the idea that the *Charter* could be seen as either an "instrument of democratization," or indeed of federal tyranny, Molinaro suggests that its greatest virtue lies in the ease with which its supposedly fundamental rights can be overcome by provincial courts and legislatures. Whereas the likes of Beatty take a rather jaundiced approach to sections 1 and 33, and to the "structural" restraints that they place against "rights," for Molinaro it is the existence of these restraints which permits democracy to breathe. The great virtue of the rights enumerated in the Canadian *Charter of Rights* is that they are not really fundamental at all.[24]

Overall then, the story of the Canadian *Charter* is something short of being an entirely happy one. There are constitutional problems, most obviously those that relate to sections 1 and 33, to the proportionate balancing of interests and to the ability of legislatures to override rights "notwithstanding." And there are substantive problems too, many of which derive precisely from sections 1 and 33. As rights theorists have noted for centuries, the definition of such concepts as "freedom" and "equality" are notoriously difficult to establish. Above all, there are deeper political doubts. A charter of rights exists within a particular "ideology," as Hutchinson terms it, a particular political mindset, one that has proved to be stubbornly resistant to genuine democratic reform.[25] The experience of the Canadian *Charter of Rights*, it seems, does not guarantee a happy ending for the new *Human Rights Act*.

The Story of the *Human Rights Act*

According to Conor Gearty, in his contribution to *Rights and Democracy*, the campaign for the incorporation of the European Convention in U.K. law has "grown from an eccentric liberal side-show into a central part of our contemporary political culture." The *Act*, he suggests, is likely to have a huge impact on many areas of domestic law.[26] There is a critical distinction here — between the situation of the *Act* within "popular culture" and its likely impact on domestic law. And any prospective history of the *Act* must oscillate between these two questions.

[23] Hutchinson, *supra* note 8 at 36–38. For a similar critique, see D. Herman, "Beyond the Rights Debate" (1993) 2 Social and Legal Studies 25 at 32.

[24] I. Molinaro, "The Charter and Quebec: Exploring the Limits of Constitutional Authority" in *Rights and Democracy* 139 at 140–42, 158–66.

[25] Hutchinson, *supra* note 8 at 35.

[26] C. Gearty, "The *Human Rights Act 1998* and the Role of the Strasbourg Organs: Some Preliminary Reflections" in *Rights and Democracy* 169 at 169–70.

The potential impact of the *Act* is immediately dulled by the critical absence of "effective" remedies. Instead of granting courts the power to strike down legislation that is deemed to be incompatible with Convention 'rights', there is what Gearty terms a "strong principle of interpretation."[27] Section 3.1 requires domestic courts to interpret legislation in a way that is compatible with the Convention, in "so far as it is possible to do so." If it is not possible, too bad. Although section 6.1 says that it is "unlawful for a public authority to act in a way which is incompatible with a Convention right," the omission from the *Act* of article 13 of the Convention, which provides for effective remedies, is critical.[28] The alternative, much vaunted by the Lord Chancellor's Department, is that judges can make "declarations of incompatibility" if a piece of legislation appears to give public authorities the power to override a Convention right. Parliament might, if it sees fit, choose to revisit that legislation with a view to its amendment or repeal. There again, it might not.

The reason for the omission of article 13 is simple. The U.K. remains wedded to the hallowed fictions of parliamentary sovereignty.[29] As Neil MacCormick, amongst many, has repeatedly affirmed, the value of these fictions is increasingly doubtful; the experience of European integration rendering the particular fiction of continuing parliamentary sovereignty especially arcane.[30] The resultant absence of effective remedies for breaches of the *Human Rights Act* is a serious weakness — a sacrifice made before an increasingly discredited idol. It cannot do other than dilute the potential impact of Convention rights in domestic law. Moreover, the absence of provisions ensuring direct vertical effect in the *Act* is exacerbated still further by the absence of horizontal applicability — the possibility of holding government to account for any infringement of rights by other private parties.[31] The immediate value of the *Act* cannot be said to lie in its effective protection of individual human rights.

This leads to the second, and arguably more important, question: that of an emerging human rights 'culture'. The *Human Rights Act* has been proclaimed by the present government as a "cornerstone" of constitutional reform. Ushering the Bill through Parliament, Home Secretary Jack Straw (as he then was) announced that that statute would "bring about the creation of a human rights culture in Britain."[32] The question of what shape this 'culture' might take is itself presently uncertain, a problem that we will return to in the final part of this article. By late 1999, Straw had moved as far as the thought that such a culture might be founded on "considerations of common humanity."[33]

Regardless of what this 'culture' might look like, beyond the rhetoric the immediate portents are, once again, discouraging. The failure of the *Act* to include the Preamble to the European Convention is both odd and disappointing. The British government, it seems, was none too keen to reaffirm an explicit and "profound belief in those fundamental freedoms which are the foundations of justice and peace in the

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27 *Ibid.* at 171–74.

28 For a discussion of the widespread concern that has been caused by the omission of article 13 from the *Act*, see K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 Mod. L. Rev. 79 at 84–86.

29 See *ibid.* at 91–93, and at 98, essentially supportive of maintaining the fictions of sovereignty.

30 See N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).

31 For a discussion of the issues of verticality and horizontality, see M. Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] Public Law 423.

32 Klug, *supra* note 5 at 7, 49.

33 *Ibid.* at 66.

world."[34] As Gearty rightly points out, this omission serves to deny domestic courts a "valuable guide to the rationale" of human rights.[35]

The extent to which the Preamble's rhetoric might sit rather uncomfortably alongside the English constitutional tradition is the subject of Martin Loughlin's contribution to *Democracy and Rights*. As he rightly points out, in general, the U.K. today enjoys "a rather basic sense of cultural disorientation with respect to constitutional matters."[36] Put crudely, outside of a certain fascination with the more photogenic members of the royal family and a passing interest in the spectacles and rituals of parliamentary life, the British on the whole are just not terribly interested in the constitution. And a lack of interest breeds a lack of engagement and, in turn, a brute ignorance. As Dicey observed, in his *Lectures on the Relation between Law and Public Opinion*, echoing Bagehot's rather more cynical asides, this is precisely how it is supposed to be. It is indeed the great strength of the British constitution, and the reason for its endurance and its resistance to change. Few really care, or at least not enough care enough.[37]

It is this that further explains why the *Human Rights Act* is so denuded of effective remedies against public bodies. It is also why no one really seems too bothered — not just about the dilution, but about the *Act* itself. The U.K. is not only devoid of a healthy constitutional culture; it is totally devoid of any sense of a rights culture, never mind a human rights culture. At best, as Loughlin suggests, such a culture might be said to be "emerging" — part of the gradual evolution of a distinctive doctrine of English public law since the early twentieth century. But this is itself something of a checkered history, as Loughlin readily admits, of judges thrashing around looking for a constitutional "morality" that might somehow fit within the common law tradition.[38]

And it is not a terribly encouraging history, as Sir Stephen Sedley, himself a Justice of the High Court, has readily admitted. As it ponders the implications of a *Human Rights Act*, the U.K. does so under the shadow of a judiciary possessed of a "long history" of "illiberal adjudication."[39] Yet, as Sedley also acknowledges, the courts must play a critical role in mediating the new statute, and one that is not merely "legalistic." The new interpretive responsibilities noted by Gearty will necessarily immerse the judiciary in issues that are deeply ethical and political. Human rights, as Sedley admits, "are by nature political, for they seek to condition how states treat individuals." They are, moreover, particular — expressions of particular Enlightenment values, of "possessive individualism" above all else.[40]

Contemplating the imminent arrival of a domestic human rights statute, another High Court Justice, Sir John Laws, expressed a contrasting interest in the Kantian idea of a "higher-order" law; one that can buttress the classical Enlightenment claims to both popular sovereignty as well as to the universality of rights. "Ultimate sovereignty rests," he concludes, "in every civilised constitution, not with those who wield

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[34] *Convention for the Protection of Human Rights and Fundamental Rights*, 4 November 1950, Eur. T.S. 5, Preamble, para. 4.

[35] Gearty, *supra* note 26 at 173–74.

[36] M. Loughlin, "Rights Discourse and Public Law Thought in the United Kingdom" in *Rights and Democracy* 193 at 193.

[37] A. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1994); also discussed in Ward, *supra* note 3 at 222–23.

[38] Loughlin, *supra* note 36 at 194–99 and 201–206.

[39] S. Sedley, "Human Rights: A Twenty-First Century Agenda" [1995] Public Law 386 at 391.

[40] *Ibid.* at 386.

governmental power, but in the conditions under which they are permitted to do so." The British constitution, accordingly, must now be understood to be itself subject to those certain "fundamental principles" that underpin the "imperative of democracy," and which are derived not just from the "sovereign autonomy of the individual," but from a "description" of the "moral nature" of humanity itself. A "good constitution," Laws argues, is one in which the authority of a political institution, even a parliament, is subservient to the "fundamental" rights which pertain to a human being.[41]

As Loughlin observes, the recent engagement of senior judiciary with the deeper political and ethical demands of human rights jurisprudence is itself suggestive of a dawning sense of new adjudicative responsibilities.[42] Gone are the days when the judiciary could hide behind the pretensions of political neutrality. Even Lord Chancellor Irvine admits that the *Act* will "create a more explicitly moral approach to decisions and decision-making."[43] As Sedley concludes, the *Act* cannot be determined solely in relation to inherited traditions, either from the common law or from the Convention. The U.K. must develop its own "juridical culture," one "which does not imagine that the poorest citizen is made equal to the richest corporation simply by according both the same rights; which does not co-opt the powerless into the opposition of the powerful to the state"; "which perceives the role of power in determining who gets to drink first and longest at the well"; and "which understands above all that in every society fundamental human rights, to be real, have to steer towards outcomes which invert those inequalities of power that mock the principle of equality before the law."[44]

Powerful rhetoric. But the case for a human rights 'culture' is also, and necessarily, the case for an engagement that reaches rather further than either the Inns of Court or the pages of academic journals — and considerably further than the debate has reached so far. As Sir John Laws recognizes, a human rights 'culture' is forged in the "crucible of a life shared with others," the reflection, above all, of a "shared morality" which defines the "good" community.[45] As both Sedley and Laws explicitly acknowledge, the protection of human rights cannot be left to judges alone.

The European Story

The *Human Rights Act* incorporates parts of the European Convention. Not surprisingly, the European perspective is central to any understanding of its genesis. The influence of the Convention in providing an impetus towards the *Human Rights Act* is clearly appreciated by the likes of Sir John Laws and Sir Stephen Sedley, as it has been by other distinguished members of the judiciary, including Lords Browne-Wilkinson, Slynn, Woolf and Bingham.[46] But it is not the story of the Convention that really matters here. It is another Europe that has described a critical sub-plot in the story of the *Human Rights Act*: the Europe of the European Communities and Union. The experience of European integration has increasingly immersed the U.K., its politicians and its courts, in the rhetoric of "fundamental" rights.

41 Sir J. Laws, "Law and Democracy" [1995] Public Law 81 at 81–87, 92–93; and Sir. J. Laws, "The Constitution: Morals and Rights" [1996] Public Law 622 at 624–27, 635.

42 Loughlin, *supra* note 36 at 200–201 and 210–13.

43 Klug, *supra* note 5 at 33.

44 Sedley, *supra* note 39 at 400.

45 Laws [1996], *supra* note 41 at 627 and 635.

46 See Sir N. Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] Public Law 397 at 405; T. Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 L. Q. Rev. 390 at 398–400; and Lord Woolf, "Droit Public — English Style" [1995] Public Law 57 at 69–70.

The situation of human rights in the jurisprudence of the European Community has never been entirely clear. The Community Treaty, established in Rome in 1958, made no explicit reference to human rights. Under the circumstances, much has depended upon the extent to which the European Court of Justice has been prepared to elevate Community rights, such as the rights to free movement and various collateral social and welfare rights, to the status of human rights. At times it has appeared to be possessed by the spirit of rights, waxing lyrically about the overarching influence of the European Convention. The 1970s is commonly seen as a decade during which the Court strove to realize a coherent philosophy of "fundamental rights," proclaiming in one case its determination to locate such a jurisprudence in the "philosophical, political and legal substratum common to the member states."[47] At other times it has proved to be rather more chary, all too ready to "balance" any mooted human right with the "social function" and "overall objectives" of the common market; those objectives, of course, being the capacity to promote trade and make money.[48]

However, despite this lack of clarity, the importance of the wider presence of Community law in British courts has been widely acknowledged. Academic commentators such as Derek Beyleveld have long argued that the case for incorporation of the Convention has been rendered irresistible by the experience of European integration.[49] Sedley too admits that the experience of European law, of cases such as *Factortame*,[50] has revealed a stark truth, that if there is a "fundamental law" in the U.K. today, it is that described by the 1972 *European Communities Act*. All domestic legislation, public or private, must now be read in the light of this particular conveyance of political and legal authority.[51] It has even been suggested, by Lord Slynn, that the same conveyance has anyway rendered the European Convention good law in the U.K.[52] Of course, if this is the case then the new *Human Rights Act*, devoid of article 13, might be seen to be a regressive, rather than progressive, development.

At the same time, common to all these arguments surrounding the present status of human rights in Community law, and of the Convention in both Community and domestic British law, is the argument that the case for some kind of rationalization is increasingly necessary. And not just because Community human rights law is conceptually incoherent, but because the legitimacy of the Union is undermined by a consistent failure to take human rights "seriously." It is, in short, time that Europe made sense of rights.[53]

Such demands have become ever more pressing as the relatively restricted ambitions of the Community have given way to the altogether grander designs of the Union. The Union defines itself as an overtly political enterprise. Early drafts of the Maastricht Treaty, which established the Union, made reference to a "federal" Europe. Removal of

47 *Handelsgesellschaft*, 11/70 [1970] E.C.R. 1125.

48 *Wachauf*, 5/88 [1989] E.C.R. 2609. For a general critique of the Court's inconsistencies, see G. de Burca, "Fundamental Human Rights and the Reach of EC Law" (1993) 13 Oxford J. of L. Stud. 283 at 316.

49 D. Beyleveld, "The Concept of a Human Rights and Incorporation of the European Convention on Human Rights" [1995] Public Law 577 at 595–98.

50 *Factortame,* C–213/89 [1990] E.C.R. I–2433.

51 Sedley, *supra* note 39 at 391; see also Laws [1995], *supra* note 41 at 88–90.

52 Comments made in a House of Lords debate. H.L. Debates, 26/11/1992, cols. 1096–98. A point argued vigorously by Beyleveld, *supra* note 49 at 589–98.

53 For some recent expressions of this need, see J. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) at 77–84, 102–29, 258–60, 279–82; and J. Shaw, "Process and Constitutional Discourse in the European Union" (2000) 27 Journal of Law and Society 4.

the notorious "F-word" does not lessen the reality of a dynamic with a clearly federal intent. And, since 1992, much energy has been expended on somehow trying to secure a credible political identity for the Union. It is for this reason that a concept of Union citizenship exists. It is for this reason, too, that there has been increasing anxiety with regard to the supposed "democratic deficit." Legitimacy, human rights, democracy — all the familiar criticisms of the European 'project' run together.[54]

And it is for this reason that there has been an increasingly vociferous debate about fundamental rights. If the story of the European Community was told by hundreds of directives that sought to complete the "single market," the story of the Union, it seems, will be told in terms of rights. In the cause of "creating an ever closer union among the peoples of Europe," article F of the 1992 Treaty committed the Union to "respect fundamental rights, as guaranteed by the European Convention" and "as they result from the constitutional traditions common to the member states." Such principles would be respected "as general principles of Community law." Of course, this fine rhetoric remained firmly outside the Community Treaty, and thus beyond the jurisdictional reach of the European Court of Justice.[55] But no matter. Despite the criticism, article F engendered a sense of optimism, a sense that the Union may one day take rights seriously.

Article F was recast at the Amsterdam Treaty in 1997, becoming article 6, and stating that the "Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to member states." The removal of explicit reference to the European Convention is instructive. In immediate terms it was a response to the European Court of Justice's Opinion that the Union had no legal capacity to sign or affirm the Convention except and insofar as it was done through Treaty amendment.[56] Thus the idea that the Union might simply sign on to the Convention, for some the more obvious and desirable solution, was removed from consideration. Not everyone was disappointed. For some, the Opinion represented an opportunity for the Union to assert its own identity, over and above that of a Convention which was starting to show its age anyway.

A mood was sensed. It was certainly the mood that appeared to possess the Cologne Council which, in the summer of 1999, announced that it was time the Union draft its own charter of "fundamental rights," one that would contain "basic" rights established in the Convention, but which would be consolidated by rights "derived from those rights common to the Member States," as well as "general principles of the Community."[57] The *Charter*, it seemed, would take the Convention and inject into it the rejuvenating elixir of those rights which define the late, or even 'post', modern enterprise: rights of

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54 For a recent restatement of this nexus, see L. Siedentop, *Democracy in Europe* (London: Penguin, 2000) at 1, 59–60, 204–205, 212–14.

55 This was a weakness quickly appreciated by a number of commentators. See D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L. Rev. 17 at 62–63, 66–69.

56 Opinion, 2/94 [1996] E.C.R. I–1759. For a discussion of the Opinion, see D. McGoldrick, "The European Union after Amsterdam: An Organisation with General Human Rights Competence?" in D. O'Keeffe & P. Twomey, eds., *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999) at 255–56.

57 See A. Heringa, "Towards an EU Charter of Fundamental Rights?" (2000) 7 Maastricht J. of European and Comp. L. 11.

"mutuality" and "obligation," of the so-called "third wave."[58]

After months of drafting and redrafting, the *Charter* emerged blinking into the light of the Nice Council in December 2000. Unlike the *Human Rights Act*, which seems so shy, so reluctant to proclaim any grand overarching public philosophy, the Preamble to the Union *Charter* proudly proclaims any number of ethical imperatives. "Conscious of its spiritual and moral heritage," the Union affirms its foundation "on the indivisible, universal values of human dignity, freedom, equality and solidarity." It is "based on the principles of democracy and the rule of law" and it confirms that "these rights" will entail "responsibilities and duties" not just "with regard to other persons" and to the "community," but also to "future generations." The reach, it seems, is all-encompassing. Even time is cowed.

Within the *Charter*, meanwhile, can be found fifty-four articles, a veritable smorgasbord of rights; some derived from the Convention, some found in various national constitutions; some clearly placed in response to the special pleadings of particular nation-states, or even particular interest-groups; some clearly present in order to clarify the constitutional situation of the *Charter* within the Treaty framework. Alongside allusions to "[h]uman dignity" being "inviolable" (article 1), the pronouncement that "[e]veryone has a right to life" (article 2) and the recognition of fundamental equality "before the law" (article 20), can be found rather more prosaic references to rights to "vocational and continuing training" (article 14.1), to "conduct a business" (article 16) and to write to a Community institution in any of the languages recognized in the Treaties (article 41.4).

The final set of rights, the "General Provisions" contained in articles 51–54, are perhaps the oddest. For, at present, the *Charter* appears to have no constitutional status at all. After months of posturing, with certain governments demanding that the *Charter* be fully incorporated in the Union Treaty and others roundly rejecting such a prospect, the *Charter* was finally appended to the Treaty with barely a moment's glance. After what was reputed to be less than an hour's consideration, the Council decided to append the *Charter* with merely declaratory force.

So the Union has its *Charter*. But no one really knows what this signifies and no one seems to care that much. Certainly there is much that is missing. Legal enforcement is missing. The jurisdiction of the European Court of Justice is missing. Even the heads of state are missing. Rather extraordinarily, and rather pointedly, the heads of state decided not to attend any inaugurating or signing ceremony. The *Charter* remains unsigned, making its already limited political stature even more peculiar. Not content with breaking its bones, the leaders of Europe have chosen to leave their crippled instrument robbed of even its dignity.

A Happy Ending?

The European experience then, like the Canadian, is rather short on reassurance. Once again it seems that a dalliance with rights is never assured a happy ending. So what are the prospects for the *Human Rights Act*? At an extreme, Allan Hutchinson suggests that the incorporation of the European Convention into U.K. law is a "huge step backwards on the path to truly democratic government."[59] Gavin Anderson is barely any more reassuring, warning that progressive, "constitutive" models of rights are likely to be overreached by classical liberal models that serve only to facilitate greater "concen-

[58] For a discussion of the Convention, and its articulation of "second" rather than "third wave" rights, see Klug, *supra* note 5 at 120–27, 164–65.

[59] Hutchison, *supra* note 8 at 30.

trations of private power."[60] Encouraged more by the potential of the *European Charter of Social Rights* than by the Canadian *Charter*, Keith Ewing suggests that the *Human Rights Act* may provide the foundation for a far more substantial edifice of rights, including social and economic, as well as human, political and civil rights. But there again, as he implicitly concedes, it might not.[61]

Kathleen Mahoney's commentary on equality rights in the *Charter* presents a rather more encouraging picture. Such rights, she suggests, can complement wider political strategies.[62] But there is a critical implication in such a conclusion. To be of value, rights need to be part of a progressive political culture. This is a view uniformly emphasized by the more positive chroniclers of the Canadian *Charter*. Thus Roland Penner applauds the *Charter* as an instrument for "engaged constitutional politics" and thus for the promotion of a "culture of liberty." Justice Rosalie Abella, similarly, is more inclined to champion the *Charter* for its ability to humanize political discourse.[63]

The cultural context is critical. In their different ways, academics such as Gearty, Loughlin and Klug, as well as judges such as Laws and Sedley, all recognize that the *Human Rights Act* will only flourish alongside the development of a progressive human rights 'culture'. So too do an array of senior politicians, or at least their rhetoric does. Thus, former Foreign Secretary Lord Howe can affirm that rights "depend at least as much upon on enlightened public opinion" as "upon anything the law might design."[64] As we have already noted, the present Home Secretary, Jack Straw, seemed to be quite possessed by the idea of a human rights 'culture'. This particular ambition, however, raises a number of awkward and related issues — related in the sense that they tap into the enduring paradox of human rights, that of relativity and context. Can there be a distinctive British human rights 'culture' and, if so, what might it look like?

The rhetoric and idealism which defined Enlightenment conceptions of right proclaimed an uncompromising universalism. The Kantian idea of right was a right that pertained to every individual, precisely because every "moral self" was earthed by a common humanity.[65] As the twentieth century progressed, such conceptions came under increased intellectual fire. In a very recent expression of this essentially 'post' modern critique of rights, Costas Douzinas accused modernist human rights philosophy of spending too much time immersed in the seemingly endless attempt to define universal rights and too little time worrying about the condition of humanity.[66]

Can human rights be re-orientated, recast in such a way that they can ameliorate the postmodern critique of conceptual indeterminacy? Can human rights accommodate context? William Twining has argued that they can, that the confrontations of "general" and "particular" jurisprudence can be overcome by a postmodern conception

[60] Anderson, *supra* note 22 at 65–67.
[61] Ewing, *supra* note 18, particularly at 92–93.
[62] Mahoney, *supra* note 17, particularly at 95–97.
[63] Penner, *supra* note 9 at 112–21, 123–25; Abella, *supra* note 10 at 601–602.

[64] G. Howe, "Sovereignty, Democracy and Human Rights" (1995) 66 Political Quarterly 137.
[65] For a discussion of the "moral self" see I. Kant, *Groundwork of the Metaphysics of Morals* (New York: Harper and Row, 1964) at 24–30.
[66] C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Portland: Hart, 2000) at 1–4, 17–19, 121–31. For a similar, though not explicitly postmodernist, argument, see S. Toope, "Cultural Diversity and Human Rights" (1997) 42 McGill L.J. 169 at 171.

of universal heterogeneity.[67] There is much to be said for such an approach, for it makes no sense to deny the universality of contextual experience. More importantly, it is this experience that can nurture and sustain rights. Devoid of cultural sustenance, outwith the kind of "lived experience" so cherished by critical legal scholars such as Hutchinson, charters of rights can all too easily decline into a state of atrophy.

There can, then, be a peculiarly British 'culture' of human rights. But it will not come easily, and it will not be wished into existence by the mere presence of a new statute. As Kathleen Mahoney infers, the Canadian experience teaches that without a wider political consciousness so-called fundamental rights can all to "easily come to signify nothing."[68] Allan Hutchinson likewise concludes that "[r]ather than settle for the attenuated discourse of rights-talk," the British "must aspire to a truly democratic polity that will enable them to become full citizens in an expansive civic dialogue over the terms and conditions of social living."[69]

This is a question of facility as much as it is of substance. As Dicey emphasized, the institutions of British government are designed to curtail "public opinion." In sharp comparison with the public debate that surrounded the enactment of the Canadian *Charter*, the *Human Rights Act* has emerged to a crushing popular ignorance and indifference. The reason for this ignorance lies in the manner of its emergence. As Francesca Klug has noted, the *Act* "has been delivered to us wholesale from on high."[70] It is, indeed, a product of institutional sclerosis. Developing a 'culture' of human rights depends upon effective institutional and constitutional reform; something more than amending the Queen's tax status and tinkering around with some hereditary peers.[71] The present U.K. government has made much of its commitment to constitutional reform. But where will the great constitutional debate be held? The occasional visit to the polling booth does not suffice.

There has, of course, been much rhetoric about human rights, just as there has been about mooted constitutional reform. But there has been little conversation. The dialogic facility necessary for the development of a human rights 'culture' does not presently exist. This does not make the casting of a prospective history any easier. There does not seem to be any intrinsically British, or English, intellectual or jurisprudential tradition that might aid the seer. And Europe, as we have already noted, offers little more by way of inspiration. In the wake of the Nice Council fiasco, the notion of a common human rights 'culture' in Europe, one based on the purported "common values" so proudly pronounced in the Preamble to the *Charter*, seems fanciful in the extreme.

Yet, paradoxically perhaps, in a recent speech Home Secretary Straw implied that the kind of rights found in Europe, and in its Convention, can only make sense within the cultural context of individual nation-states — an attitude which undoubtedly accounts for the U.K.'s barely veiled hostility towards the putative *Charter* during the summer and autumn of 2000.[72] So the Home Secretary clearly detected the rootings of a distinctive national 'culture' of human rights. But what might these rootings be?

The much-vaunted philosophy of the "third way" is supposed to describe the current "spirit of the age," not just in the U.K.

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67 W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000).

68 Mahoney, *supra* note 17 at 122.

69 Hutchison, *supra* note 8 at 44.

70 Klug, *supra* note 5 at 24.

71 Ewing, *supra* note 18 at 93.

72 Klug, *supra* note 5 at 66.

but in North America as well, and Europe indeed. Though its precise intellectual visage is notoriously difficult to perceive, the high priests of the "third way," such as Anthony Giddens, wax lyrically about the importance of revitalizing a "life politics," a notion resonant with invocations of the "lived experience" of law.[73] Moreover, the "third way" contemplates and engages in rights-talk. But it does so in a very particular way, one that appears to be aligned with the idea of a "third wave" of human rights, of rights of "mutuality" and obligation.[74]

For the prophet of the "third way," rights it seems, are "means." But these are rather particular means. And, most importantly, the end to which they are directed is not the familiar Kantian "end" of securing the freedom and capacity of the "moral self." Rather, "third way" ideology sees rights as the "means" to facilitating the greater, more immediately Aristotelian, imperative of the community, or in 'new' Labour-speak, the community of "stakeholders." Such a community is as much bound by "responsibilities" and "moral obligations" as it is by rights. There are "no rights," Giddens confidently affirms, "without responsibilities."[75]

As Murray Hunt has concluded, it is clear that the *Act* is "designed to introduce a culture of rights that is more communitarian than libertarian in its basic orientation." In such a "culture the individual citizen" is intended to be "more than the mere bearer of negative rights against the state, but is a participative individual, taking an active part in the political realm."[76] Such a view echoes that of philosophers such as Alan Gerwith, who openly align human rights with a distinctively communitarian agenda. Human rights, for Gerwith, underpins a "distributive" politics of the "common good."[77] But as we have already noted, the ideal of "participation" in constructing the "common good" is as dependent upon the facility for doing so, and upon the necessary institutional reforms, as it is upon any charter of rights.

In a 1996 lecture, Tony Blair castigated the "individualistic" liberalism exemplified by John Rawls's *Theory of Justice*.[78] The "third way" was to be defined in terms of "families and communities," the nature of humanity "only" through the "moral power of personal responsibility for ourselves and each other." It is no surprise that critics of the "third way" have so readily noted the Burkean undertone to so much of its rhetoric. In a lecture given in 1998, the Archbishop of York advised against the "indiscriminate use of the concept of rights," and the danger it posed to the wider aspiration of creating a social "network of mutual obligations." Perhaps more revealing is the Home Secretary's warning that "corrupted liberal orders" are those that promote a "politics of dutiless right." Two years after castigating Rawls, Prime Minister Blair took further aim at any emerging rights 'culture'. "A decent society is not actually based on rights," he stated,"[i]t is based on duty."[79]

Small wonder then that the U.K. government should seem to be so ambivalent

[73] A. Giddens, *The Third Way: The Renewal of Social Democracy* (Malden, MA: Polity Press, 1999) at 44, 67. For a detailed attempt to make some jurisprudential sense of this notion, and of the "third way" itself, see R. Mullender, "Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy" (2000) 27 Journal of Law and Society 493.

[74] Klug, *supra* note 5 at 166.

[75] Giddens, *supra* note 73 at 65–66.

[76] M. Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 Journal of Law and Society 86 at 89–90. For an overarching discussion of these possible influences see Klug, *supra* note 5 at 50–66.

[77] A. Gerwith, *The Community of Rights* (Chicago: University of Chicago, 1996) at 97–98.

[78] J. Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999).

[79] All quotes taken from Klug, *supra* note 5 at 50, 52, 58, 60.

about the *Human Rights Act*. In ideological terms, the philosophy of the "third way" is very different indeed from that which underpins the European Convention. Given the nature of this paradox, given the ideological dynamics at play and given the oft-proclaimed need to forge a human rights 'culture', the need for a genuine public debate becomes ever more critical. For there is clearly a debate to be had: one that asks serious questions about the public philosophy within which the *Act* is supposed to flourish, about the extent and nature of European influences, about the relative universality and particularity of the idea of human rights.

And it is a debate which must be enjoined by Britain as a whole — not just judges, politicians and churchmen. The need to open up conversation is critical. As Richard Rorty observes, the stories of human rights need to be told and each community must tell its own story. There must be a conversation, not just about rights, but about what it means to be human. For human "solidarity," the "social hope" so beloved of John Dewey, as well as Rorty himself, can only be founded on a conversation that places jurisprudential discourse, including the discourse of rights, within the broader context of human engagement. A postmodern human rights is as much about listening to "sad and sentimental stories" as it is agonizing about the meaning of enumerated rights. "The world does not speak," as Rorty advises, "[o]nly we do."[80] Rights are not derived from some metaphysical source. Rather, they are the product of conversation. Democracy requires that it is a conversation in which everyone is engaged.

In the cold light of day, the essential flaw in the array of human rights statutes and charters which have suddenly descended on the U.K. is all too obvious. For what is missing is far more conspicuous than what is present. What is missing is not just effective remedies, or even a residual 'culture' within which human rights might be set. What is missing, crucially, is the facility for conversation, the facility to create and nurture a healthy culture of human rights. Its absence is not coincidental. And neither is the absence of any sign of its redress.

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[80] R. Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989) at 186. For a more explicit discussion of human rights in a postmodern context, see Rorty's lecture, "Human Rights, Rationality, and Sentimentality" in S. Shute & S. Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993) 175.

CANADIAN FEDERALISM AND QUÉBEC SOVEREIGNTY

by Christopher Edward Taucar (New York: Peter Lang Publisher, 2000) pp. 255

Reviewed by Claude Couture

Since the 1976 referendum, the Québec question has fascinated many authors in the United States and has created interest in the American publishing industry for Canadian authors on the subject. This book is a perfect example of this phenomenon and of the quest for answers to the Québec question in the United States, which peaked again in the wake of the 1995 referendum. The author, a Toronto-based lawyer who studied constitutional law for more than over twelve years, provides the American public with a comprehensive overview of the Québec question in terms of the functioning of Canadian federalism.

The book is divided into three parts and eleven chapters. The first part is a general introduction to the basic elements of Canadian federalism, while the second part deals with the history of the feud between Canada and Québec. The third part evaluates the performance of Québec in the context of the competition between provinces in the Canadian federation. The thesis of the book is simply that the Canadian federation favours competition and that Québec has performed very well in that climate of competition. Consequently, there are no grounds for the secession of Québec.

According to Taucar, the main justifications for separation are Québec's inability to protect continued used of the French language, not only among French-speaking minorities outside Québec, but even inside Québec, and the general failure of Canadian federalism. The author dismisses these claims. In some ways, Québec has never been as French as it is today. For example, the percentage of Québécois whose maternal language was French went from 82.5 in 1951 to 80.7 in 1971 and to 82.2 in 1991. In other words, the last two decades saw an increase in the number of people who declared French their maternal language. But more importantly, 83.3 per cent of Québécois in 1991 declared French the language they spoke at home, illustrating the fact that the province has been able to assimilate, to a certain extent, some groups who were not originally French-speaking. At the same time, the Anglophone population in Québec went from 13.8 per cent to 9.7 per cent in 1991, while the allophone population grew from 150,000 individuals in 1951 to 559,872 in 1991. In fact, in 1997 the allophone population constituted 9 per cent of the Québec population, but 19 per cent of the Montréal region and 26 per cent of Montréal Island. Still, a 1997 study revealed that 87 per cent of people interviewed in Québec said they use French in public, compared to 11 per cent for the English language. Thus, it seems that Québec is more and more able to absorb people from both the English-speaking community and others, referred to as allophones, into the French language.

As for the influence of the French language at work, significant gains were made in the last two decades. For example, in metropolitan Montreal, as administrators, Francophones increased their representation from 45 per cent in 1971 to 67 per cent in 1991. As technicians, still in metropolitan Montreal, Francophones went from 53 per cent in 1971 to 69 per cent in 1991. In terms of the largest corporations (enterprises of 1,000 workers or more) Francophone directors increased from 19 to

35 per cent between 1971 and 1991. In 1991, the number of workers outside Québec City working in French was 88 per cent, while in metropolitan Montréal it was 56 per cent. These examples, among many in the book, are used to support the proposition that Québec has no legitimate claim against the Canadian federation.

Indeed, according to Taucar, all these positive changes were made possible precisely because of and not despite the structures of Canadian federalism. The author describes the institutions of the federation and its functioning with numerous details. Particularly since 1969, with the passage of the *Official Languages Act* and, more importantly, since 1982 with the *Canadian Charter of Rights*, Québec has been able to win the competitive battle for resources inside the federation while protecting its French culture better than ever.

If this is the case, how can one explain the result of the 1995 referendum, with the federalists claiming only a very narrow victory? In the book's conclusion, Taucar ventures into the domain of ideological discourse by explaining the state of mind of the Québécois as the result of a certain discourse described by such authors as Christian Dufour and Guy Laforest, the "discourse of the survival" or the *Conquêtisme* (referring to the trauma of the 1760 Conquest). But precisely where there should be a substantial development of these ideas, the explanation is reduced to a simple reference to the work of these two authors. How indeed can anyone explain the fact that the sovereigntist movement became stronger in the 1990s, at a time when Québec was winning the competitive game of the Canadian federation? How can there be such a gap between the accomplishments of the last decades and the success of the discourse of failure in Québec? Unfortunately, this very descriptive book, although rich in information of all sorts about the Canadian federation and Québec, falls short of explaining or even indicating any substantial theory that would be of interest in understanding why such a gap exists in Québec.

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Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971–1995

by Miriam Smith (Toronto: University of Toronto Press, 1999) pp. 211

Reviewed by Catherine Kellogg

Miriam Smith's highly readable and articulate account of the lesbian and gay rights movement 1971–1995, poses the following question: how has the entrenchment of the *Canadian Charter of Rights and Freedoms* — and in particular section 15 — changed the way that Canadian lesbians and gays "do politics"? Her argument is that the most important change ushered in with the *Charter* (and its "rights-based" interpretive political frame) is the way it figured in the transformation of the *goals* of political action in lesbian and gay communities from "gay liberation" in the 1970s, to "equality rights" in the 1980s and 1990s.

It is this narrative of transformation that is the most interesting dimension of Smith's research. She draws a portrait of the distinctively emancipatory character of lesbian and gay struggles through the 1970s, the roots of which were in women's liberation and the new left. In this sense, she argues, while civil rights were a pressing political concern among gay liberationists in the 1970s, this struggle was part of building a social movement aimed at sweeping sexual and political transformation. The demise of a strong sexual counterculture in Canadian cities, the advent of AIDS and the beginnings of neo-liberal modes of governance meant that by the early 1980s the focus of many lesbian and gay advocacy groups had switched from sexual and personal liberation to equality-seeking. In Smith's view, the *Charter* was a structure of political opportunity whose advent was thus neither the "cause" of this shift, nor was it its sole determinant. In her view the *Charter* is neither the celebrated political tool many of its advocates make it out to be, nor is it simply a demobilizing and conservatizing political institution. This is not to say that the *Charter* has been unimportant to lesbian and gay political organizing in Canada, but it is to argue that the *Charter* has not been a decisive political tool for lesbian and gay politics.

This conclusion is most interesting when it is set in the context of, on the one hand, such theorists as Michael Mandel who argue vigorously that, in the wake of the *Charter*, progressive politics have been "depoliticised" and swallowed up by the courts,[1] and on the other, Rainer Knopff and Ted Morton, who suggest that the *Charter* has paved the way for "special interests" to approach the state.[2] Smith intervenes in this left–right stand-off with the important insight that legal discourse is not simply a given, but rather produces various political possibilities, while closing others off. At the same time, she argues, the interests or identities of those who take up legal claims are not transparent. Smith is attentive to the impact of "rights talk," tracing the ways that lesbian and gay identities themselves emerge as historical possibilities out of the very struggle she documents.

Thus, Smith's book intervenes in three overlapping debates and literatures. The first is the set of debates which emerged in the 1990s in the disciplines of political

[1] M. Mandel, *The Charter of Rights & the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1994).

[2] R. Knopff & T. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

science and law which reacted strongly — both positively and negatively — to the entrenchment of the *Charter* in 1982. Smith's book contributes as well to the literature on social movements, a literature that also emerged in the 1980s and 1990s. Indeed, this literature has regularly pointed to lesbian and gay organizing as exemplary of the kind of politics endemic to those "late capitalist" regimes possessing a civil society robust enough to withstand calls for its democratization. Smith's most important contribution to this literature is the addition of state and policy initiatives as "structures of political opportunity." Thus, Smith's work also engages with literature thinking through, on the one hand, the complex relationship between social actors — like lesbians and gays — and, the structures of political opportunity — like the courts — that are available to them.

Placing her analysis squarely in these three sets of debates, Smith's book reminds us that the equality provision in the *Charter* spurred anxiety in the hearts of Canada's political status quo and hope among those disadvantaged by that same status quo. The equivocal answer Smith gives to whether or not the equality provision of the *Charter* has "freed" Canadian lesbians and gays is precisely why it is so satisfying a read.

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