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Constitutional Cases 2004: An Overview

Patrick J. Monahan* and Evan Van Dyk**

This volume of the Supreme Court Law Review, which consists of papers presented at Osgoode Hall Law School's 8th Annual Constitutional Cases Conference held on April 15, 2005, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2004.¹ The Court handed down a total of 78 judgments in 2004,² 19 (or 24 per cent) of which were constitutional cases.³ As in previous years, the majority (17 out of 19) of the constitutional

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¹ A case is defined as a "constitutional case" if the decision of the Court involves the interpretation or application of a provision of the "Constitution of Canada," as defined in s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics 1994-2004*, available online at <http://www.scc-csc.gc.ca/information/statistics/HTML/cat4_e.asp>.

³ The 19 constitutional decisions handed down in calendar year 2004 were as follows: *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 [hereinafter "Auton"]; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 [hereinafter "Canadian Foundation"]; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650 [hereinafter "Lafontaine"]; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 [hereinafter "Haida"]; *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 [hereinafter "Harper"]; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 [hereinafter "Hodge"]; *Martineau v. Canada (Minister of National Revenue-M.N.R.)*, [2004] S.C.J. No. 58, [2004] 3 S.C.R. 737 [hereinafter "Martineau"]; *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] S.C.J. No. 50, [2004] 3 S.C.R. 95 [hereinafter "Néron"]; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 [hereinafter "NAPE"]; *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489 [hereinafter "Demers"]; *R. v. Fontaine*, [2004] S.C.J. No. 23, [2004] 1 S.C.R. 702 [hereinafter "Fontaine"]; *R. v. Lyttle*, [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193 [hereinafter "Lyttle"]; *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 [hereinafter "Mann"]; *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 [hereinafter "Tessling"]; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 [hereinafter "S. 83.28 Application"]; *Vancouver Sun (Re)*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 [hereinafter "Vancouver Sun"]; *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 [hereinafter "Same-Sex Marriage Reference"]; *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 [hereinafter "Syndicat Northcrest"]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 [hereinafter "Taku River"].

decisions were Charter cases. Two of these Charter cases also dealt with federalism issues,⁴ while a further two cases dealt with Aboriginal rights.

I. CHARTER CASES

The McLachlin Court continues to be receptive to Charter claims, though less so in 2004 than in 2003, with seven out of 17 (or 41 per cent) of the Charter claims heard succeeding. Since McLachlin J. became Chief Justice on January 7, 2000, 39 out of a total 79 (49 per cent) Charter claims have succeeded. While demonstrating a small decline from 2003, this still represents a marked increase from the success rate of 24 per cent (31 out of 90 cases) seen between 1996 and 1999, and the 32 per cent success rate (86 out of 264 cases) seen in the 1991-1995 period.

1. Equality Rights 20th Anniversary

With April 17, 2005 marking the 20th anniversary of the coming into force of section 15 of the Charter, three articles in the volume look back at the development of equality jurisprudence over this period. Each author offers a different perspective on this jurisprudence: Peter Hogg⁵ is critical of the Court's development of the test for a violation of equality rights; Donna Greschner⁶ notes the strength of Canadian jurisprudence in this area, particularly in contrast with the American experience; and Judy Rebick⁷ places herself between Hogg and Greschner in tracing both the positive and negative political effects of section 15 over the past 20 years.

⁴ Federalism issues were considered in *Demers* (Criminal Code provisions dealing with accused found unfit to stand trial upheld under federal Criminal law power) and the *Same-Sex Marriage Reference* (federal provision stating that officials of religious groups may refuse to perform marriages not in accordance with their religious beliefs found *ultra vires* as encroaching on provincial power over solemnization of marriage under s. 92(12) of the *Constitution Act, 1867*). These federalism issues are not considered in any detail by the essays in this volume.

⁵ "What is Equality? The Winding Course of Judicial Interpretation" (2005), of this volume, at 39.

⁶ "Praise and Promises" (2005), of this volume, at 63.

⁷ "The Political Impact of the Charter" (2005), of this volume, at 85.

Hogg views the *Law*⁸ test for violations of equality rights as a wholly negative development. Three particular criticisms that have been made of the “human dignity” criterion are offered: it is vague, offering very little substance as a test; it confuses the distinction between section 15 and section 1 by introducing an evaluative judgment at the preliminary stage; and it increases the burden on claimants by raising the threshold to be met before the government is forced to defend its legislation. Pointing out that the “contextual factor” of correspondence — an inquiry into legitimacy of purpose and reasonableness of action — has come to be the dominant factor in section 15 cases and that section 1 has been used only once to justify legislation since the advent of the *Law* test, Hogg argues that the Court should move back towards an *Andrews*-like⁹ approach, which would show greater respect for the boundary between the two provisions.

Donna Greschner offers 15 points about the section 15 jurisprudence and, in doing so, provides a positive assessment of its development. For Greschner the Canadian judiciary’s treatment of gay and lesbian rights, its rejection of originalism, its embrace of lessons from international jurisprudence and its application of a progressive interpretation of the Constitution (all in contrast to American developments) are reasons for celebration. However, Greschner questions how far the Court will be able to go in improving positive liberty in areas such as poverty reduction. In agreement with Hogg, Greschner recognizes the problems with the *Law* test, and suggests that it might be improved by developing different criteria for different types of discrimination. Finally, Greschner wonders about the inability or unwillingness of women’s groups to rely on section 28 of the Charter, particularly in the *NAPE* case this year.

Judy Rebick examines the Charter’s effects from a political perspective. Whatever the legal impact, Rebick argues, section 15’s political impact has been undeniably positive and is witnessed in the mobilization of women, disabled people, visible minorities and Aboriginals into a unique coalition. Again using the American experience as a reference point, Rebick notes the strength of the women’s movement in Canada through the 1980s and 1990s. Like Greschner, Rebick also questions

⁸ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

⁹ *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.

why section 28 has not been used by women's groups and asks why the Charter has not done more for visible minorities over the past 20 years.

2. Equality Rights

With judgments in *Canadian Foundation*, *Hodge*, *Auton*, *NAPE* and the *Same-Sex Marriage Reference*, the Supreme Court's section 15 docket was characteristically busy in 2004. In our view, the Court also made significant progress in 2004 in clarifying or simplifying equality rights analysis. For example, in *Hodge* the Court makes it clear that section 15 analysis must involve a comparison between the claimants and a *relevant* comparator group; moreover, the Court clarifies that the selection of a comparator group is ultimately a question of law for the courts. Thus, although the claimants can and should suggest a relevant comparator group, this suggestion cannot be determinative. In *Hodge* a former common law spouse had sought to compare herself to married separated spouses for purposes of claiming CPP survivor benefits. The Court found that the relevant comparator group is actually divorced spouses, a group that was not entitled to CPP benefits. Thus there was no denial of a benefit and no discrimination for purposes of section 15. We regard this clarification as both helpful and important.

The *Auton* case is also significant because it clarifies that denial of equal treatment must operate "by law"; moreover, in determining whether this requirement has been satisfied it is important and essential to have regard to the precise terms of the statutory scheme in question. The section 15 claim advanced in this case was premised on the belief that the scheme guaranteed everyone funding for all "medically necessary" services. The Court found that this premise was incorrect, since the scheme was designed to fund "core services" only. The Court also noted that the proper comparator group in this case was to those persons seeking funding for therapy that was "emergent and only recently becoming recognized". Taking this comparator group into account, there was no evidence that the B.C. government had been any less receptive to the claim for autism therapy funding than for other comparable claims.

The Court's analysis in these cases is clear, well reasoned and unanimous. The vague concept of "human dignity", which had been rightly

criticized since its emergence in the *Law* case¹⁰ as failing to provide any determinacy to equality rights analysis, plays a secondary role in the analysis. The Court seems to be clearing away the confusion that has plagued its equality rights analysis over much of the past decade, which we regard as very encouraging.

Essays in this volume focus in particular on *Auton*, *NAPE* and the *Same-Sex Marriage Reference*,¹¹ key section 15 decisions in the latter half of 2004. Papers by Geoffrey Cowper, and by Christopher Manfredi and Antonia Maioni focus on *Auton*, which reversed lower court decisions concluding that autistic children are constitutionally entitled to costly health care services. In discussing the communitarian themes that can be found in this year's section 15 jurisprudence, Roslyn Levine and Jonathan Penney provide broader reflections on the evolution of section 15. Elsewhere in this volume, Jamie Cameron adds to the commentary on *NAPE*; further analysis of the *Same-Sex Marriage Reference* is provided by Jamie Cameron and Bruce Ryder.

Geoffrey Cowper¹² argues that the *Auton* decision reflects a trend in the Supreme Court of deciding equality claims which challenge social programs on narrow legal grounds, rather than on broader principles of social policy. He questions the impact of the factual record in cases where it conflicts with deeply held social views. Cowper's analysis leads him to state that while the Court allows governments to balance societal and individual interests, this balancing act cannot be used to justify irrational and arbitrary distinctions under section 15.

With reference again to *Auton*, Christopher P. Manfredi and Antonia Maioni¹³ examine litigation's potential as an instrument of health policy reform. Two basic claims have recently been made: the first argues that there is little evidence that litigation has been a useful tool of social policy reform; the second claims that even without direct positive effects, rights litigation can have important long-term political effects by

¹⁰ *Id.*, note 8.

¹¹ Though it is discussed by Roslyn Levine and Jonathan Penney, *Canadian Foundation* was decided early in 2004 and was addressed by last year's conference. See P. Burstein, "What's the Harm in Having a 'Harm Principle' Enshrined in Section 7 of the *Charter*?" (2004) 24 S.C.L.R. (2d) 160; R. Levine, "In Harm's Way: The Limits to Legislating Criminal Law", *id.*, at 195; and J. Benedet, "Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible 'Correction' of Children", *id.*, at 217.

¹² "Equality Rights and Social Benefit Programs" (2005), of this volume, at 93.

¹³ "Reversal of Fortune: Litigating Health Care Reform in *Auton v. British Columbia*" (2005), of this volume, at 111.

empowering marginalized groups. Manfredi and Maioni use the *Auton* decision to show that the results in such cases have been mixed. While *Auton* mobilized groups around the country and spawned widespread litigation and high levels of public support, the cases, in the end (with the Supreme Court ruling) have changed no legal rules. The authors warn that using litigation as a tool of health care policy reform results in sophisticated queue-jumping by prioritizing certain treatments, reducing complex policy issues to two-party disputes and, when litigation is successful, imposing national solutions on local problems.

Although the tradition in Canadian equality jurisprudence has been to view the rights protected by section 15 as individual rights and leave the concept of communitarian standards to section 1, Roslyn Levine and Jonathon Penney¹⁴ demonstrate that the Supreme Court's equality rights decisions in 2004 have applied communitarian concerns — previously seen only in dissenting opinions — at the section 15 stage of the analysis. The shift away from the subjective element of human dignity analysis, the Court's substitution of the comparator group in *Hodge* and the linking of the denial of the right to the provision in the Newfoundland pay equity case reflect this shift away from a preoccupation with individualistic conceptions of equality rights.

3. Freedom of Religion

The *Charter's* guarantee of religious freedom has been quiet in recent years but was brought to the forefront in 2004 with two decisions from Quebec: *Lafontaine* and *Syndicat Northcrest*. Meanwhile, gay marriage engaged section 15 and section 2(a) at the same time and challenged the Supreme Court, in the *Same-Sex Marriage Reference*, to consider whether there are conflicts between the two guarantees. Bruce Ryder's paper on religious neutrality is followed by Richard Moon's discussion of *Syndicat Northcrest*, and David Brown provides a comment on both papers.

Starting from the point of view that religion and conscience are important positive goods, Bruce Ryder¹⁵ argues that while the Charter

¹⁴ “The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?” (2005), of this volume, at 137.

¹⁵ “State Neutrality and Freedom of Conscience and Religion” (2005), of this volume, at 169.

imposes a duty of religious neutrality on the state, this duty requires the state to be neutral as between religions and not to be neutral about religion. In fact, in *Lafontaine*, Ryder argues, the Court might have seized the opportunity to place on governments a positive obligation to foster religious activity, so long as such assistance is extended equally to all religious groups. In discussing the *Same-Sex Marriage Reference*, Ryder notes that the state cannot refuse to take a position on policy issues which have a religious dimension; rather, its obligation is to determine the validity of state laws based on constitutional norms rather than on religious doctrine (a test by which the common law definition of marriage fails). Finally, Ryder predicts that the majority judgment in *Syndicat Northcrest* may open the door to an expansive interpretation of freedom of conscience in the future, though the Court's apparent division on religious issues suggests that these matters will be debated again in the coming years.

In criticizing the Court's ruling in *Syndicat Northcrest*, Richard Moon¹⁶ highlights the tension between two competing points of view: one is that both religious and non-religious beliefs and practices are a matter of individual autonomy protected by a single freedom ("freedom of conscience and religion"); the other is that religious beliefs and practices merit an additional level of protection over non-religious beliefs due to their way of connecting the individual to a community and identity. Moon argues that the majority's favouring of the second principle privileges religious beliefs over secular beliefs when these come into conflict with the larger public interest. The Court's attempt to balance both of these competing principles (Moon suggests that to take sides may in any case be impossible), is reflected in tensions over the scope of the freedom, the nature of the wrong addressed by the freedom, the place of religion in public debate and the character of public secularism.

David Brown¹⁷ builds his comment on the framework of the tensions identified by Moon. He rejects the suggestion that the Court's ruling in *Syndicat Northcrest* has privileged religious beliefs over non-religious matters of conscience. In particular, he argues that with the lack of jurisprudence on freedom of conscience, it is difficult to predict how the

¹⁶ "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005), of this volume, at 201.

¹⁷ "Neutrality or Privilege? A Comment on Religious Freedom" (2005), of this volume, at 221.

Court might treat these matters. Brown claims that it was necessary to protect non-mandatory religious practices in order to reflect the reality of religions as practised by their adherents. Finally, he rejects the idea that there is a dichotomy between protecting religious beliefs as freely and individually chosen, and protecting them as cultural characteristics. Since protection under both of these justifications can be found in section 2(a) and section 15 of the Charter, the challenge is to develop a jurisprudence of limitation that allows the Court to balance sensitivity toward conscientious conviction with the ability of the community to place reasonable limits on religious beliefs.

4. Freedom of Expression

Harper v. Canada was one of the Supreme Court's most significant decisions under section 2(b) in recent years. There, a majority held that Parliament's third party spending limits, which apply during federal election campaigns, are a justifiable restriction on freedom of expression. This section of the conference publication includes three papers on this issue, by Colin Feasby, Christopher Bredt and Richard Haigh. Their contributions are followed by Mark Freiman's discussion of *Néron v. C.B.C.* and the law of defamation. It should also be noted that the Court decided a third significant case on freedom of expression, in the context of the open court principle; its decision in *Vancouver Sun* arose under Parliament's *Anti-terrorism Act* and is discussed by David Paciocco's paper on the Charter and the criminal law.

In examining the *Harper* decision, the three commentators concluded that the Supreme Court's Charter analysis of third party election spending limits is plagued by shortcomings. Colin Feasby¹⁸ argues that the Court's failure to recognize the potential for politicians to abuse election rules led it to take an approach that was overly deferential. While the Court accepted the government's stated objective of levelling the playing field in election campaigns, a more rigorous and sceptical inquiry of the government's objective would have enabled the Court to investigate whether election finance legislation is in fact aimed at maintaining the political status quo, thereby curtailing the agenda-setting

¹⁸ "Freedom of Expression and the Law of the Democratic Process" (2005), of this volume, at 237.

function of issue-advocacy groups and shielding politicians from criticism. Feasby also agrees that while the nature of the election campaign may require special rules, the Court in *Harper* extended its deference to legislation affecting expression outside of the campaign, an area in which such deference cannot be justified.

Along the same lines, Christopher Brecht and Laura Pottie¹⁹ agree that a healthy dose of judicial scepticism is particularly warranted for regulations that restrict advocacy in the electoral context. They cite a tendency for Parliament to enact legislation that preserves the status quo, and argue that there is a clear need to keep this tendency toward “self-interested regulation” in check. By posing a number of examples, they also point to the flaws of the egalitarian model, which was adopted by the majority opinion in *Harper*.

Richard Haigh²⁰ argues that the Court has not probed the nature of political advertising, as compared with commercial advertising. The question of election financing is one part of a larger problem of fair elections, rooted in unequal access to the media, the narrowing of political debate and the influence of wealth in politics. In fact, Haigh questions whether, in this era of more subtly applied political tactics favouring wealthy parties, election spending limits can do anything more than pacify voters, reassuring them of the surface fairness of the electoral system. In embracing a deferential approach to Parliament, however, the Court may have foreclosed the opportunity to examine these issues in greater depth in the future.

Examining another aspect of freedom of expression, Mark Freiman²¹ argues that the Court’s decision in the defamation case of *Néron v. CBC* sets a new low-water mark for the protection of expression which, although applying directly only in Quebec, might have important implications in the common law provinces as well. By applying a test of professional journalistic standards that is incapable of providing a framework for balancing the public interest with the private interest of the plaintiff, the Court has contradicted the balancing act required by

¹⁹ “Liberty, Equality and Deference: A Comment on Colin Feasby’s ‘Freedom of Expression and the Law of the Democratic Process’ ” (2005), of this volume, at 291.

²⁰ “He Hath a Heart for Harping: Stephen Harper and Election Spending in a Spendthrift Age” (2005), of this volume, at 305

²¹ “The Public Law Consequences of Private Disputes: *Néron v. CBC* and the Law of Defamation” (2005), of this volume, at 321.

*Hill v. Church of Scientology*²² when imposing limits on expressive freedom. The Court's use of "wrongful pruning" as a concept in examining the truth of a media broadcast might also have important implications for the common law defences of truth and fair comment in defamation cases.

5. Legal Rights

Alan Young comments on the Supreme Court's key decisions on the Charter's legal rights in 2004 which, apart from *Canadian Foundation*, were *Mann* and *Tessling*. In addition, the Court considered the constitutionality of the *Anti-terrorism Act's* investigative hearing; though the Court upheld the provision in *Section 83.28 Application*, it strongly endorsed the open court principle in *Vancouver Sun*. Despite that endorsement, David Paciocco's paper expresses concerns about the increase in government secrecy that has been provoked by terrorism. Scott Hutchison comments on both papers.

Citing several recent appeal court decisions correcting clear-cut section 8 violations, Alan Young²³ asks why this provision has seemingly had so little effect on the practice of policing. According to Young, the Supreme Court's two recent decisions in this area give little hope that this will change. By setting out vague standards for the use of new surveillance technology in *Tessling*, and by approving searches in the context of investigative detention in *Mann*, but refusing to outline limits on this new police power, Young argues that the Court has failed to provide clear guidance to the police. By not establishing clear limits these decisions make it difficult for the police, who are obligated to respect the rights of Canadians under section 8 of the Charter, as well impair any "dialogue" between the Courts and Parliament in determining the scope of police powers in relation to search and seizure rights.

David Paciocco²⁴ outlines recent developments in the area of the "open court" principle by examining how the government and the legal community have responded to the terrorist attacks of September 11, 2001. The best way to ensure a proper balance between the interests of openness and security is to maintain a healthy commitment to appropri-

²² *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130.

²³ "Search and Seizure in 2004 — Dialogue or Dead-End?" (2005), of this volume, at 351.

²⁴ "When Open Courts Meet Closed Government" (2005), of this volume, at 385.

ate norms among those responsible for defining and administering these laws. However, recent provisions, including amendments to section 38 of the *Canada Evidence Act*, and sections 83 and 486 of the *Criminal Code*, cause Paciocco to doubt whether this commitment is deep enough. Nonetheless, he finds some cause for hope in the Supreme Court's strong defence of open courts in *Vancouver Sun (Re)*.

Scott Hutchison's²⁵ comment suggests that the Court's decision in *Tessling* has struck an appropriate balance between the individual's interest in privacy and society's interest in law enforcement. Rather than simply erect barriers to investigation, the Court has applied a purposive approach in interpreting section 8. Hutchison also notes that search and seizure law has become far too complex to be effectively followed by police and that more clarity and coherence will enhance respect for the Constitution by police and other state actors. Finally, in response to Paciocco, Hutchison agrees that institutional culture is essential in protecting openness of the courts; however, he observes that it may be more realistic to develop a culture of openness in routine policing than in a national security context, an arena in which the stakes are unavoidably raised.

II. ABORIGINAL RIGHTS

The Court examined Aboriginal rights in two important cases in 2004 in the *Haida Nation* and *Taku River* decisions, both written by McLachlin C.J.C. for a unanimous Court. In these cases, the Court outlined the extent of the Crown's obligation to consult with Aboriginal groups before authorizing activities in cases where the existence of Aboriginal rights has not yet been established. Brian Slattery and Ria Tzimas examine how these cases fit into the broader development of Aboriginal rights jurisprudence, while Kent McNeil looks at whether provincial governments even have the authority to infringe on Aboriginal lands, thereby undercutting the duty to consult outlined by the Court.

Brian Slattery²⁶ argues that the *Haida Nation* and *Taku River* decisions are an affirmation of the principle of the honour of the Crown

²⁵ "Knowledge is Power: The Criminal Law, Openness and Privacy" (2005), of this volume, at 419.

²⁶ "Aboriginal Rights and the Honour of the Crown" (2005), of this volume, at 433.

outlined in section 35 interpretation since the *Sparrow*²⁷ case. This principle points simultaneously to a need for both litigation and negotiation. Litigation can be used by native groups to demonstrate the existence of historical rights, but under the *Haida Nation* paradigm, negotiation between the Crown and Aboriginal peoples can create new, modern iterations of generic rights, resulting in a generative and dynamic role for section 35 in which the Crown has an ongoing duty to identify Aboriginal rights in a contemporary form.

Kent McNeil's²⁸ article questions the legitimacy of the "duty to consult" placed on the British Columbia government. Through an examination of the powers vested in provincial governments by the Constitution and the *Indian Act*,²⁹ McNeil demonstrates that the authority of the B.C. government to infringe on the lands in question — a logical prerequisite of the duty to consult — may not exist. Since Aboriginal title has not yet been demonstrated over the lands in question, the British Columbia government may in the future have the authority it seeks, but in the meantime, any government action would later be open to a claim of wrongful intrusion.

Rather than viewing the *Haida Nation* and *Taku River* decisions as representing a major change on questions of jurisdiction, Ria Tzimas³⁰ argues that the Court's decisions fit into a broader context of reconciliation, which can be traced to the *Quebec Secession Reference*.³¹ However, Tzimas questions the possibility of achieving reconciliation through the prescribed course of negotiation, the ability of the parties (not only governments and Aboriginal groups but other interested parties) to find common ground and the potential for helpful interim agreements to be created while parties negotiate towards ultimate reconciliation.

²⁷ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075.

²⁸ "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*" (2005), of this volume, at 447.

²⁹ R.S.C. 1985, c. I-5.

³⁰ "*Haida Nation* and *Taku River*: A Commentary on Aboriginal Consultation and Reconciliation" (2005), of this volume, at 461.

³¹ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

III. KEYNOTE ADDRESS

In his contribution, Michael Ignatieff³² urges academics not to be silent in the face of our current political crisis, one which will have a profound impact on national unity. Canadian federalism, due to the diverse character of our country, is a continual process of self-justification and self-invention, in which academics must take responsibility for leadership in constantly re-articulating what Canada stands for. Only by improving federalism, particularly through re-thinking our current models of fiscal federalism, can we face the challenge of separatism.

IV. CONCLUSION

The 2004 year saw a number of important developments in Charter and Aboriginal rights jurisprudence. Yet 2004 was also a year of significant change for the Court, with Iacobucci and Arbour JJ., both of whom had emerged as key figures on the Court in recent years, retiring in June 2004. Indeed, a core group of Chief Justice McLachlin and Iacobucci, Arbour and Fish JJ. were key to the majorities in a number of contested 5-4 decisions in early 2004. With Abella and Charron JJ. joining the Court in late 2004, four of nine justices have been members for three years or less and, barring unexpected early retirements, the relatively youthful Court is entering a period where we can expect stability in its membership.³³ It will therefore be important in 2005 and beyond to assess whether the recently reconstituted Supreme Court attempts to shift the Court's constitutional analysis in new or different directions.

³² "Keynote Address: Law and Politics in the Canadian Constitutional Tradition" (2005), of this volume, at 29.

³³ Apart from Major J., who will retire in December 2005, no other retirements from the Court are scheduled until 2013.

