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# GOVERNING IN A RIGHTS CULTURE

Mary Dawson, Q.C.\*

## I. INTRODUCTION

This paper will address the impact on governments<sup>1</sup> of the entrenchment of rights in our Constitution and will also touch upon some of the claims that are made as to their broader impact on society as a whole. The positive observations are explored as well as some of the concerns. An attempt is made to assess critically some of the concerns that have been expressed within government circles.

The extent to which these criticisms and claims reflect reality, however, is beyond the scope of the paper. That assessment *should* be made, at least in relation to policy decisions taken by government, but that will require focused discussions in specific cases with those who are directly involved in those policy decisions.

This paper, hopefully, is a first step in that direction. It will draw no specific conclusions and will make no recommendations. Rather it will focus on identifying concerns so that we can address them head on. Once we have identified them, and agreed that these *are* our concerns, we will be able to deal with them. We can lay aside those that are myths and move beyond those we can do nothing about. We should then be in a position to deal with the rest.

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\* Associate Deputy Minister, Department of Justice, Ottawa. This paper is reproduced with permission of the CBA from conference materials published in *The Canadian Charter of Rights and Freedoms: Twenty Years Later* in 2001. The views expressed in the paper should not be taken as necessarily reflecting the position of the Government of Canada on any matter.

<sup>1</sup> Often in this paper, when governments are referred to, the reference is to government in the broad sense, including the legislatures.

## II. BACKGROUND

The patriation of Canada's Constitution, on April 17, 1982, was in itself a watershed event, completing at last the final legal step in Canada's slow march to independent nationhood. Canada now had its own amending formula. But that was not all that Canada acquired on that rainy spring day. The *Canadian Charter of Rights and Freedoms*<sup>2</sup> was given pride of place as Part I of the *Constitution Act, 1982*.<sup>3</sup> Immediately following the Charter is Part II, *Rights of the Aboriginal Peoples of Canada*, with its recognition and affirmation of the Aboriginal and treaty rights of the Aboriginal peoples of Canada. These first two parts of our patriation package have had a profound impact on Canadian society.

The Charter is a reflection of the classical liberal vision championed by Prime Minister Pierre Elliott Trudeau, with its spotlight on the importance of the individual and individual rights.<sup>4</sup> The Charter was also conceived as a unifying force for Canadians, establishing a common set of constitutionally protected rights that apply to each and every Canadian. Much debate took place as the Charter was constructed, concerning both its detail and the desirability of entrenching a Charter at all. Once the Charter became part of our Constitution, however, much of the nervousness and concern melted away, at least amongst the general public. Perhaps one of the most remarkable observations about the Charter is the extent to which it has become a symbol of pride and a source of identification for Canadians, thus becoming a unifying force as had been hoped.

Aboriginal and treaty rights, unlike most of the rights in the Charter, are collective, group rights that belong not to individual Aboriginal persons but to the Aboriginal group to which they belong.<sup>5</sup> Section 35 of

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<sup>2</sup> *The Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "the Charter").

<sup>3</sup> Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>4</sup> It is interesting to note, though, that some of the rights protected by the Charter relating to linguistic issues have, to a greater or lesser extent, a group aspect to them. See sections 16 to 23 (official languages), section 16.1 (linguistic communities in New Brunswick), and section 23 (minority language educational rights). Consider, as well, the underlying protection for minority groups that is afforded by section 15.

<sup>5</sup> This is not to say that Aboriginal or treaty rights are not often invoked at the individual level. See, for example, *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

the *Constitution Act, 1982*,<sup>6</sup> recognizes the separate status of particular groups on the basis of their historical circumstances. Charter rights pertain to our status as individuals and are concerned with the relationship between the state and the individual. Thus the basis for these two types of rights is quite different. Aboriginal peoples can claim their rights against governments or against other Canadian citizens. The Charter, on the other hand, is directed against governments alone. Charter rights and section 35 rights are not at all comparable, but are treated together in this paper because both types of rights form part of the “rights culture” in which we now find ourselves.

Section 35 of the *Constitution Act, 1982* is clothed in simple terms. Subsection 35(1), the core of the section, could almost be taken as a tautological statement: “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” Despite its apparent simplicity, the courts have given it great force. The last two decades have seen enormous strides in the identification and acceptance of Aboriginal and treaty rights in Canada.

As exciting and popular as the entrenchment of Parts I and II in the *Constitution Act, 1982* have been, there are those who claim that the entrenchment was not a good idea, or at best that it was a mixed blessing.

The Charter has had an enormous impact on governments. Some Charter critics would claim that far too much power has been shifted from the legislatures and governments to the courts. Others, while not necessarily critics of the Charter itself, have expressed broader concerns relating to power and control. They point to the added impediments to governmental action and decision-making that come with the need to take those new rights into account. Some worry that the legislatures and governments are actually being prevented from achieving important

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<sup>6</sup> Section 35 reads as follows:

35.(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

goals or are being diverted by rights activists from social and economic reforms that are more important than the issues of the day brought by pressure groups. More generally, some claim that the rights culture is having an effect that goes to the root of our social structure and is damaging the very cohesion of our society.

Canada was not alone in entrenching rights in its Constitution. Our closest neighbour, the United States of America, has had its Bill of Rights for more than two centuries.<sup>7</sup> The United Nations' *Universal Declaration of Human Rights*, a major influence on Canada's Charter, was adopted and proclaimed on December 10, 1948, following closely on the end of the Second World War.<sup>8</sup> In the years that followed, the United Nations expanded the scope of its human rights protections in a number of instruments.<sup>9</sup> Under the auspices of the Council of Europe, formed in 1949 for the protection of human rights, pluralist democracy and the rule of law, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>10</sup> was adopted on November 4, 1950 and came into force on September 3, 1953. In turn, individual states are establishing their own special laws.

Within Canada, itself, the move towards the Charter was a gradual one. In 1960, the *Canadian Bill of Rights*<sup>11</sup> was enacted by Parliament, but it was a simple statute and, with few exceptions,<sup>12</sup> was not given pre-eminent force. During the period leading up to the entrenchment of the Charter, human rights codes were developing in Canada at both the federal and provincial levels.<sup>13</sup>

<sup>7</sup> The American Bill of Rights came into force on December 15, 1791.

<sup>8</sup> G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

<sup>9</sup> Among the most important are the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and the *International Covenant on Economic, Social and Cultural Rights*, 999 U.N.T.S. 3.

<sup>10</sup> The protection of these rights was reaffirmed very recently with the *Charter of Fundamental Rights of the European Union*, which was signed and proclaimed on December 7, 2000.

<sup>11</sup> S.C. 1960, c. 44; R.S.C. 1985, App. III.

<sup>12</sup> For one of the few instances where the Bill of Rights was given teeth, see *R. v. Drybones*, [1970] S.C.R. 282.

<sup>13</sup> Saskatchewan's legislation was the first, in 1947 (*Saskatchewan Bill of Rights*, 1947, S.S. 1947, c. 35). The *Canadian Human Rights Act* was enacted in 1978 (S.C. 1976-77, c. 33, now R.S.C. 1985, c. H-6). For further details, see Tarnopolsky, *Discrimination and the Law*, 2nd ed., revised by Pentney (Don Mills, Ontario: De Boo, 1985), Chapters 1 and 2.

Canada was one of the first, if not the first, country with a strong tradition of parliamentary supremacy to entrench rights in its Constitution. This was an easier leap for Canada than for Great Britain, for instance, because Canada already had a written constitution. A written constitution for Canada was made necessary by the fact that it was a federation with a division of legislative powers that had to be established in detail by statute. Canadian governments have become used to having their legislation scrutinized by the courts to ensure that they are not overstepping their legislative authorities. However, the entrenchment of individual and group rights in our Constitution has brought a whole new dimension to the relationship between the legislatures and the courts. Constitutionally protected rights bring us into the domain of values and public policy far more deeply and starkly than do the more technical legal issues relating to the division of powers.

Rights are not new to the legal system. Private law, regulating the relationship between individual citizens, has always been a matter of weighing the rights of one claimant against another, a matter of winners and losers. This is the proper domain of the courts, not of governments. Furthermore, from time to time, in private law cases the courts have been seen to take sudden leaps, to break from precedents, and, in effect, to create or invent new law. One need only look at one of the first torts cases studied in law school, *Donoghue v. Stevenson*,<sup>14</sup> for an example of this judicial creativity. *Donoghue* was a 1932 case in Scotland about a snail in a ginger beer bottle. In that case, the Privy Council (Lord Atkin) for the first time in a Commonwealth court extended the causal link in a negligence suit to find that a manufacturer owed a duty of care, not only to direct purchasers, but to potential clients further down the chain of connection.

There are also examples of such leaps in cases where a government is a party. Again turning to jurisprudence cited in first year law school, we find a constitutional law case, *Edwards v. Attorney-General for Canada*,<sup>15</sup> perhaps better known in recent years as the “persons case.” That was the case where women sought the right to be eligible to sit in the Senate, to be considered “qualified persons” under section 24 of the then *British North America Act, 1867*.<sup>16</sup> In that case, the Judicial Committee of the Privy Council overturned a long line of cases from several different countries that confirmed the ineligibility of women to

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<sup>14</sup> [1932] A.C. 562.

<sup>15</sup> [1930] A.C. 124.

<sup>16</sup> 30 & 31 Vict., c. 3.

take public office. Not only did it break from a clear line of jurisprudence in the common law world, but it also created a new way to interpret Canada's Constitution. It was strongly argued by governments that the *British North America Act* had to be interpreted and understood as it would have been in 1867, when written. Lord Sankey, in the Privy Council, found differently, stating that the Constitution "planted in Canada a living tree capable of growth and expansion within its natural limits."<sup>17</sup> He established the "living tree doctrine" which has had an important effect on the interpretation of our Constitution, allowing it to grow and develop in order to fit current circumstances.

Even within this context, the constitutional changes made in 1982 were profound. The courts have taken up their expanded domains with enthusiasm and vigour.<sup>18</sup> The changes have themselves unleashed a dynamic of their own and have changed the way Canadians understand themselves as individuals. Global events take us, and much of the rest of the world, in the same direction. In recent years many countries, and many international groupings of countries, have developed standards of human rights, as we have done in Canada. We have entered a rights age, a rights culture. This culture reinforces itself, and the pursuit of one's rights, whether as between citizens and their governments or more broadly as among private citizens, becomes accepted and, some would argue, expected.

### III. CONSTITUTIONAL BALANCING MECHANISMS

The search for balance and compromise, so much a Canadian trait (or at least one to which we aspire), is reflected in the Charter and in the way that our courts deal with the protection of Aboriginal and treaty rights under section 35.

Both sections 1 and 33, forming figurative and literal brackets around the rest of the Charter, offer some relief from the potential rigour of its guarantees.

Canada, so far as we know, was the first country to include in its fundamental law on rights a provision contemplating the limitation of

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<sup>17</sup> *Supra*, note 15, at 136.

<sup>18</sup> Without the Charter and section 35, one could surmise that the courts might have gradually moved in the same general direction as that in which these constitutionally entrenched rights have taken us, but not with the same specificity or within the same time frame.

those rights.<sup>19</sup> Section 1<sup>20</sup> sets out the general guarantee of the rights and freedoms in the Charter, and then allows for the rights and freedoms to be superseded by public interest considerations if their limitation can be “demonstrably justified.” This provision, notably placed at the beginning of the Charter, carries with it the message that rights and freedoms cannot be seen as absolutes. Rights and freedoms can be limited by law so long as the limits are justified in accordance with section 1.

There are several sections of the Charter that carry within themselves balancing mechanisms that limit the scope of rights even before resort is to be made to section 1. For example, section 8 refers to “*unreasonable* search and seizure” (emphasis added) and section 9 refers to “the right not to be *arbitrarily* detained or imprisoned” (emphasis added). In those cases, most of the balancing takes place with the rights section itself.

Other sections, like sections 7<sup>21</sup> and 15<sup>22</sup> of the Charter, include concepts that are particularly susceptible to value judgments. Section 7 refers to “principles of fundamental justice,” while section 15 addresses equality rights. Courts have exercised a good portion of their balancing within these sections, rather than waiting for a section 1 analysis. One

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<sup>19</sup> Other countries are showing interest in this approach. South Africa’s Constitution has followed the Canadian precedent and Israel has considered doing so as well.

<sup>20</sup> Section 1 of the Charter reads as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>21</sup> Section 7 reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

<sup>22</sup> Section 15 reads as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



significant effect of this shift, at least in principle, is on the burden of proof. The burden of proof lies on government under section 1, but on the rights claimant under the rights and freedoms sections of the Charter.

Recent Supreme Court decisions have evidenced a tendency to import into sections 7 and 15 almost all of the balancing that can take place in relation to them. This trend is being called the “contextual approach.” Much has been written recently on the move away from section 1.<sup>23</sup> This subject is a large one and well beyond the scope of this paper.

Section 33<sup>24</sup> is another unique Canadian provision. It allows for a five-year suspension of certain of the Charter protections if Parliament or a legislature finds it appropriate to invoke the section. The Quebec National Assembly established a blanket application of section 33 for unique political reasons<sup>25</sup> soon after the patriation of the Constitution in

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<sup>23</sup> See, for a good overview of recent trends under section 15, Hogg’s discussion of discrimination: Hogg, *Constitutional Law of Canada*, looseleaf, 4th ed., vol. 2, (Toronto: Carswell, 1997) (updated 1999, release 1), section 52.7(b).

<sup>24</sup> Section 33 reads as follows:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

<sup>25</sup> Soon after the Charter was adopted, the Quebec National Assembly passed an omnibus law, *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21, invoking the section 33 override in relation to all Quebec laws as well as adopting the override routinely in each new Act. This practice lapsed as a routine matter when a Liberal government was elected in Quebec at the end of 1985.

1982 but, with that exception, section 33 has not often been used.<sup>26</sup> This is perhaps as it should be since section 33 is a blunt instrument and carries with it no justificatory text or other balancing mechanism. On the other hand, it does have a five-year limit. There are those who argue that section 33 has been underutilized.<sup>27</sup> The Supreme Court itself has given it a tentative legitimacy, contemplating the possibility of “*even* overarching laws under section 33 of the Charter.”<sup>28</sup> Whether desirable or not, section 33 does provide elected representatives with a way to escape the framework of the Charter in exceptional circumstances.

In a parallel way, the jurisprudence on section 35 of the *Constitution Act, 1982*, relating to Aboriginal and treaty rights, has recognized that these rights must be understood and made operational in the context of a diverse society that is integrated with the Aboriginal peoples who hold those rights. Accordingly, the courts recognize that governments still have the power to regulate the exercise of Aboriginal rights if those governments are pursuing a valid legislative objective, but they must

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<sup>26</sup> Saskatchewan invoked section 33 in the *S.G.E.U. Dispute Settlement Act*, S.S. 1984-85-86, c. 111 (back to work legislation) for fear that it offended paragraph 2(d) of the Charter (freedom of association). The use of the override was later proven unnecessary by the Supreme Court of Canada in *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460, where the majority held that the right to strike was not protected by paragraph 2(b). In addition to the early general application of the override in Quebec, the Quebec National Assembly invoked section 33 several times, even after the Liberal government was elected in 1985. Its use became very controversial in one instance: in relation to the French-only sign law in *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56. That declaration expired after five years and was not renewed. Alberta used the override very recently in the *Marriage Amendment Act* (S.A. 2000, c. 3, amending *The Marriage Act*, R.S.A. 1980, c. M-6), which came into force on March 23, 2000 (to prevent marriage between same-sex couples). The Government of Alberta also considered using it recently in legislation aimed at capping liability relating to involuntary sterilizations, but withdrew that initiative in light of public reaction. The Parliament of Canada has never invoked section 33.

<sup>27</sup> See, for example, Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills, Ontario: Oxford University Press, 2001), at 38, and Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), at 914-17.

<sup>28</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 566, *per* Iacobucci and Cory JJ. (emphasis added).

still honour their responsibilities towards the Aboriginal peoples before any other user group.<sup>29</sup>

The Supreme Court consistently stresses the need to negotiate a solution when the interests of others clash with the rights and interests of the Aboriginal peoples of Canada.<sup>30</sup> The Court recognizes that the parties themselves can come up with much better solutions than the Court can if those parties will negotiate in good faith to find those solutions. Such matters belong, to a great extent, in the political realm where it is much easier to avoid a win-lose solution that may not lend itself to long-term accommodation.

#### IV. THE IMPACT OF JUDICIAL DECISIONS

##### 1. Charter Rights

The Charter has created a new relationship between federal, provincial and territorial governments in Canada and their citizens.<sup>31</sup> It has established a direct right for any Canadian to take governments in Canada to court in relation to the infringement of any of the rights guaranteed by the Charter, whether by actions of a government or by statute. Governments in Canada have always been answerable for failure to adhere to general principles of natural justice or for failure to meet human rights standards they have set in their own legislation, but the Charter has opened up a multitude of new grounds of complaint. Section 15, the equality section, is particularly fruitful in this regard. It makes governmental programs and social policy decisions vulnerable to reassessment by the courts on grounds of discrimination. The remedies for a successful challenge have, on occasion, resulted in adjustments to government programs that have expanded them beyond their original scope and have sometimes resulted in significant additional expenditures. When large sums of money are at stake, alarm bells go off amongst politicians, public servants, and the general public alike.

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<sup>29</sup> See *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; and *R. v. Marshall*, [1999] 3 S.C.R. 456 (hereinafter cited as *R. v. Marshall (No. 1)*).

<sup>30</sup> See *Delgamuukw v. British Columbia*, *supra*, note 29, at 1123, and *R. v. Badger*, [1996] 1 S.C.R. 771, at 817-18.

<sup>31</sup> In fact, many of the provisions of the Charter actually extend beyond Canadian citizens to include all individuals in Canada.

An important early Charter decision of the Supreme Court of Canada was the *Singh*<sup>32</sup> case in 1985. It had wide policy and financial implications. One of the primary purposes of the Charter was to protect the weak from the strong, the individual from the power of the state. The *Singh* case addressed itself to one of the most vulnerable groups in society. It related to procedural protection for refugee claimants. The Supreme Court found that all individuals present in Canada, not only citizens or residents, will benefit from the protection of section 7 of the Charter on the bases of the principles of fundamental justice referred to in that section. It went on to find that oral hearings were necessary in certain circumstances to determine the credibility of refugee claimants. This resulted in fundamental changes to our refugee determination scheme that involved costs in the billions of dollars. It also resulted in changes in procedures of many other decision-making bodies.

The *Schachter* case,<sup>33</sup> like the *Singh* case,<sup>34</sup> had an important impact on public money. That case, based on section 15, started on its way through the courts in 1986<sup>35</sup> and came to its ultimate resolution in the Supreme Court of Canada in 1992. Mr. Schachter was a natural father complaining that his rights had been violated because adoptive fathers had access to benefits that were not available to natural fathers. The Federal Court-Trial Division extended the benefits to natural parents and this was upheld by the Federal Court of Appeal.<sup>36</sup> The Supreme Court modified the decision, limiting the cases where, and setting rules for determining when, the courts can actually adjust legislation, thereby changing the result in the *Schachter* case. However, by that time a relatively small program (\$5 million) had been converted to one costing hundreds of millions. Furthermore, the original trial level decision led to an entirely new parental benefits scheme that adjusted the way benefits were paid to all parents, and resulted in a new theory of maternity and parental leave.

On the other hand, in the recent *Lovelace* case,<sup>37</sup> the Supreme Court declined to extend to non-status Indians and Métis communities rights

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<sup>32</sup> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

<sup>33</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679.

<sup>34</sup> *Supra*, note 32.

<sup>35</sup> *Schachter v. Canada*, [1988] 3 F.C. 515 (C.A.).

<sup>36</sup> *Schachter v. Canada*, [1990] 2 F.C. 129 (T.D.).

<sup>37</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950. In that case, the Court found that the casino project was specifically targeted at improving the circumstances of a status Indian community in a way that corresponded to their actual needs and circumstances and that the exclusion of the

assigned to members of bands registered under the *Indian Act*. That case involved the distribution of funds generated by a casino on an Indian reserve.

Some Charter cases, often in the area of criminal law, can result in costs that are not measurable in monetary terms but can have a significant societal impact. The *Askov* decision<sup>38</sup> is, perhaps, the best known example of such a case. There, the Supreme Court found that criminal cases were simply taking too long in the courts and rendered a decision that resulted in large numbers of cases being dropped. That decision resulted, as well, in significant new provincial expenditures for the administration of justice, particularly in Ontario. In the *Stinchcombe* case,<sup>39</sup> additional burdens were put on the Crown relating to disclosure of evidence to the accused. Such a decision has significant costs to society, some of them hidden. While full disclosure carries with it the possibility of shorter trials and reduces the chance of injustice towards the accused, the *Stinchcombe* case resulted in the need for additional resources to comply with the new requirements and generated a significant volume of litigation to determine how far disclosure should go, particularly when the information relates to third parties.

At the same time, courts are by no means oblivious to cost considerations. In the *Schachter* case<sup>40</sup> the Supreme Court found that, while cost implications cannot be used to justify a particular decision, they can be considered in determining the appropriate remedy. Two years later, in the *Prosper* case,<sup>41</sup> the Supreme Court declined to impose certain obligations on government to make legal aid available, observing that such a finding would result in serious cost implications for the provinces. In that case the Court found that:

... it would be a very big step for this Court to interpret the Charter in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation.<sup>42</sup> (Emphasis in original)

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other groups did not undermine the purpose of the program since it was not based on a misconception of the needs of the other groups.

<sup>38</sup> *R. v. Askov*, [1990] 2 S.C.R. 1199.

<sup>39</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

<sup>40</sup> *Supra*, note 33, at 709.

<sup>41</sup> *R. v. Prosper*, [1994] 3 S.C.R. 236.

<sup>42</sup> *Id.*, at 267.

Sometimes court decisions have minimal cost implications, but may in effect cut off policy options for governments. The *Burns and Rafay* case<sup>43</sup> contained strong language that one could argue might even cut off the possibility of Canada reintroducing the death penalty, should Parliament some day determine that it would be appropriate to do so.<sup>44</sup> Yet, in another controversial area, the Supreme Court struck down the abortion provisions of the *Criminal Code*<sup>45</sup> in the *Morgentaler* case,<sup>46</sup> but left room for Parliament to re-enact its legislation on abortion while at the same time meeting the requirements of the Charter, as established by the Court. The Government of Canada attempted new legislation following the decision but, when it met some resistance in the Senate, chose to let the situation stand. It has not taken up the subject of abortion again, leaving the field unregulated.

## 2. Aboriginal and Treaty Rights

As for Part II of the *Constitution Act, 1982*, relating to Aboriginal and treaty rights, section 35 raised to the constitutional level the status of the Aboriginal and treaty rights that were in existence on April 17, 1982. Unlike the Charter, section 35 does not address itself directly to governments and legislatures. Nor does it direct itself to remedies in case of a breach of the rights it recognizes. Nor does it include express balancing mechanisms such as those described in the previous section of this paper. Because section 35 is a recognition and affirmation of rights, it follows that these rights can be raised in any context and can be argued in disputes against private litigants as well as against governments.

In the decade before section 35 came into force, the courts were increasingly defining and relying on Aboriginal rights in their decisions and establishing the extent of government responsibilities towards the

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<sup>43</sup> *United States of America v. Burns*, [2001] 1 S.C.R. 283.

<sup>44</sup> *Id.*, at para. 77, the Court found that “while government policy at any particular moment may or may not be consistent with principles of fundamental justice, the fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty reflects, we believe, a fundamental Canadian principle about the appropriate limits of the criminal justice system.”

<sup>45</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 251.

<sup>46</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

Aboriginal peoples of Canada.<sup>47</sup> No one was quite sure, when section 35 was enacted, just what effect entrenchment would have on these rights. There have been many important Aboriginal cases in the years following the enactment of section 35 that have ensured that the rights affirmed in that section have been given full force. Twenty years later we find that litigation on Aboriginal and treaty rights has grown exponentially.

The Supreme Court addressed the meaning of section 35 for the first time in the *Sparrow* case,<sup>48</sup> a 1990 decision. It confirmed that the “existing” rights were those that were not extinguished prior to 1982. It also found that those rights were not absolute but that any laws that infringed them would have to meet a high standard of justification (not at all dissimilar to the “reasonable limits” test we find in section 1 of the Charter). Finally, and of great significance to governments, the Supreme Court found in the *Sparrow* decision that the Government of Canada<sup>49</sup> had a “fiduciary” relationship with the Aboriginal peoples of Canada at the constitutional level.<sup>50</sup> This means that the government must keep the best interests of the Aboriginal peoples at heart when dealing with their interests. In the words of the Court, “the special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.”<sup>51</sup>

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<sup>47</sup> See *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313, recognizing that the Nishga people of British Columbia possessed Aboriginal rights to their lands that had survived European settlement; *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1980] 1 F.C. 518 (T.D.), relating to mining laws impairing Aboriginal rights in the Baker Lake Area, particularly the right to hunt caribou.; *Guerin v. R.*, [1984] 2 S.C.R. 335, described *infra*, note 50.

<sup>48</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>49</sup> This would apply as well to other governments. See, for example, *R. v. Côté*, [1996] 3 S.C.R. 139, at 185-87 and *Delgamuukw v. British Columbia*, *supra*, note 29, at 1107.

<sup>50</sup> Another important decision that dealt with a fiduciary relationship of the Government of Canada was *Guerin v. R.*, *supra*, note 47. That case dealt with Indian properties and the Government's role in dealing with these properties as a fiduciary. This is a more usual use of the trust or fiduciary concept. It likely served as an inspiration to the Supreme Court in developing the concept in relation to section 35.

<sup>51</sup> *R. v. Sparrow*, *supra*, note 48, at 1114, *per* Lamer C.J.C. and La Forest J. on behalf of a unanimous court.

The finding of this special relationship between the Government of Canada and the Aboriginal peoples of Canada confirms a unique link between the Government and Aboriginal peoples that was not evident from section 35. It puts a particular overlay on how the government is to address Aboriginal issues. Hence, there is a special responsibility on governments that goes beyond the relationship that governments would have with other groups as well as beyond the relationship that a private individual would have with Aboriginal peoples. While there is no direct application provision linking the rights to governments, as there is in subsection 32(1) of the Charter,<sup>52</sup> Aboriginal and treaty rights remain a particular responsibility of governments that differs from, and augments, in relation to Aboriginal peoples, the relationship that governments have more generally with all Canadian citizens.

A recent case of great significance to the Government of Canada is the *Marshall* case,<sup>53</sup> dealing with treaty rights of the Micmac Indians to fish on the east coast of Canada. In that case the Supreme Court gave a broad, and many would say unexpected, interpretation to a treaty entered into in 1760-61 and found that the Aboriginal peoples involved must be allowed access to a moderate livelihood from fishing in that area.<sup>54</sup> It also found that the constitutional rights of those Aboriginal peoples must be balanced against the non-constitutionalized rights of others engaged in the fishery, citing a previous decision where it stated "it has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another."<sup>55</sup> The Government of Canada is currently involved in negotiations to give practical effect to the *Marshall* decisions and, in doing so, must find a way to balance the rights and interests of the

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<sup>52</sup> Subsection 32(1) reads as follows:

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

<sup>53</sup> *R. v. Marshall No. 1*, [1999] 3 S.C.R. 456.

<sup>54</sup> *Id.*, at 470.

<sup>55</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533 (hereinafter cited as *R. v. Marshall No. 2*, at 552-53, referring to *R. v. Nikal*, [1996] 1 S.C.R. 1013, at paras. 91-92.



Aboriginal peoples and the interests of the non-native fishers who also depend on that fishery for their livelihood.

#### V. THE ROLE OF THE COURTS

There is no doubt that the entrenchment of the Charter and of Aboriginal and treaty rights in the Constitution of Canada in 1982 has limited the power of the legislatures and governments and has increased the power of the courts, particularly the Supreme Court of Canada, since the courts are called upon to determine the scope of those rights. Governments must make sure that their actions and their laws respect the constitutionally-entrenched rights and the courts must, when those actions or laws are challenged, determine whether governments have succeeded in respecting the rights. Power has flowed from the elected representatives to an appointed judiciary. These are clear facts.

What is not so clear is whether this has been a good thing. Interestingly, the Supreme Court is in high repute. It scores high in public opinion polls and enjoys an excellent international reputation. A Supreme Court decision on rights generally paves the way for Parliament or the other legislature involved to proceed with legislative or policy initiatives that respond to that decision with much less opposition than it would have had in the absence of such a decision. Politicians consistently score low on popularity polls, with lawyers among the few who would score lower. Generally, Canadians appear quite comfortable having the courts, certainly the Supreme Court, rule on the legality of governmental actions. Judges are seen as more dispassionate and fairer than politicians and as more inclined to support minority rights. Much of the academic literature on the subject would suggest the same comfort level with the courts.<sup>56</sup> Furthermore, some argue that the perceived legitimacy of the Supreme Court has been enhanced by the very fact that rights have been entrenched.<sup>57</sup>

Despite the relatively high comfort level with the courts, there certainly are criticisms of the judicial role in rights determination. Some

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<sup>56</sup> See Devlin, "The *Charter* and the Anglophone Legal Theory" (1997), 4(1) *Review of Constitutional Studies*, at 36-37, for a summary of opinion on both sides of this discussion.

<sup>57</sup> Ignatieff, *Challenges for the Future* (Supreme Court of Canada 125th Anniversary Conference, Ottawa, September 2000), at 1-2; Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills, Ontario: Oxford University Press, 2001), at 27-28.

argue that it is undemocratic to allow an unelected institution to make what are fundamentally policy decisions. Allan Hutchinson rather caustically remarks in a recent work:

My proposal to abandon rights-talk and give democratic dialogue a real chance will only ring hollow and naïve to those latter-day aristocrats who crave the privilege to decide what is best for others.<sup>58</sup>

There is likely a significant correlation between those who criticize the judicial role and those who oppose the Charter itself or are, at best, luke-warm to it.

In a related vein, some argue that courts should not be making these decisions because judges constitute a remote group who do not reflect, represent or even understand the general public. Joel Bakan examines what he calls the “trust” arguments for relying on judges and concludes that there is no basis to defer to their value judgments because judges have their own biases from which they cannot escape.<sup>59</sup> He claims that judges are fundamentally a conservative group, chosen from among an elite stratum of society, and that they take their approaches from what he calls “dominant ideologies.”<sup>60</sup> He agrees with a number of other critics that the courts favour big business interests, which they see as meritorious because they contribute to the wealth of society. Even letting corporations in under the shelter of some of the Charter protections is cited as evidence of this bias.<sup>61</sup> Many, including Bakan and Hutchinson, point to the lack of success that unions have had in pressing some of their claims before the courts as evidence of this same tendency.<sup>62</sup>

Section 15 of the Charter is particularly laden with value judgments. Questions can be raised about some of the section 15 decisions that extend

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<sup>58</sup> Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), at xiii.

<sup>59</sup> Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), Chapter 2.

<sup>60</sup> *Id.*, Chapter 7.

<sup>61</sup> See, as well, Hutchinson, *supra*, note 58, at 32-34 and 150-51.

<sup>62</sup> Examples of these cases are: *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; the “Labour Trilogy”: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.

benefits to groups not covered by the legislation that establishes the benefits scheme. The Supreme Court has stated that:

Since *Andrews*, it has been recognized in the jurisprudence of this Court that an important, *though not exclusive*, purpose of s. 15(1) is the protection of individuals and groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities”. The effects of a law as they relate to this purpose should always be a central consideration in the contextual s. 15(1) analysis.<sup>63</sup> (Emphasis added.)

Of particular interest in the Court’s statement is that the element of disadvantage is not essential to the application of section 15. A number of section 15 decisions, in fact, do result in extending coverage to groups that would not usually be considered to be disadvantaged. One example is the *Schachter* case,<sup>64</sup> referred to earlier, where unemployment insurance benefits relating to childcare were extended to natural fathers. This is evidently an area where the thinking of the Court has evolved since the earlier cases and appears to be continuing to evolve.

Of significance in this connection is a very recent speech to a legal audience by the Chief Justice of Canada. In that speech,<sup>65</sup> she recognized that “Supreme Court of Canada decisions repeatedly assert that reversing the harmful effects of stereotypical discrimination is the central purpose of section 15.”<sup>66</sup> However, she went on to say:

... rectifying the situation of disadvantaged groups is arguably not the only type of equality that falls within section 15 of the Charter. The Charter positively accords Canadians equal benefit of the law and equal protection from the law’s burden. This can be argued to extend the guarantee of equality to matters beyond the scope of traditional anti-discrimination law, to the equal provision of state benefits, even where the group excluded is not the object of historic discrimination. The primary concern in such cases is not whether

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<sup>63</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at 537, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>64</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679.

<sup>65</sup> Chief Justice McLachlin, “Equality: The Most Difficult Right” (2000 Constitutional Cases, Professional Development Program, Osgoode Hall Law School, York University, 6 April 2001) (published in this law review).

<sup>66</sup> See McLachlin, *id.*, at p. 25 of this book.

the group to which the plaintiff belongs has suffered historical disadvantage requiring a legal remedy, but whether the State's largesse has been appropriately distributed.<sup>67</sup>

The Chief Justice then concluded her assessment of the issue by posing the very questions that governments continue to grapple with:

Where the goal is equal distribution of benefits, the rules seem less clear than where the goal is amelioration of the downtrodden class's situation. Must the claimant be a member of a disadvantaged group? Could the government, for example, cut all men out of a welfare scheme on the ground they are not disadvantaged, leaving section 15(2) aside for the moment? What serves as a sufficient or substantial distinction between one disadvantaged group and another? Where, within groups, can the legislature permissibly draw cut-off lines? What about the argument that it is for the legislature to decide how to allocate limited resources? Canadian courts have wrestled with these issues in *Schachter* and, again, in *Law*. In *Law*, the Court upheld Parliament's power to cut off benefits on the basis of age, reasoning that the distinction did not deny the complainant's human dignity. However, issues remain, and the Canadian attempt to fit benefit schemes into section 15 doctrine will continue to develop.<sup>68</sup>

None of this leaves governments with a great deal of guidance. It can afford some comfort, however, in the fact that both the courts and governments are asking the same kinds of questions.

Intuitively, one might assume that the charge that courts are elitist might add some weight to the argument that too much power has flowed from Parliament to the courts. The problem with this, however, is that many see Parliament as being controlled by elites as well. Much has been heard in recent years about the dissatisfaction of back-benchers as to their level of input into public policy decisions. Their frustration is understandable. But it is not only elected members of Parliament or of other legislative assemblies who are seeking greater input into decisions. The public at large would also like to be heard. These are ongoing issues that continue to require attention.

Perhaps the most potent argument against the legitimacy of the courts determining rights in the social policy context is that they are simply not equipped to make decisions on social policy issues. Judges are trained in the

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<sup>67</sup> *Id.*, at pp. 25-26 of this book.

<sup>68</sup> *Id.*, at p. 26 of this book (footnotes omitted).

law, not in social policy, and do not have access to the tools necessary to balance competing social interests.<sup>69</sup> Furthermore, the adversarial nature of the litigation process does not lend itself to the trade-offs and compromises that make the political process workable.

The Supreme Court itself has recognized the strength of this argument and has expressed, on a number of occasions, the need to defer to the legislatures when policy choices that do not go to fundamental values must be made. In the *Libman* case, the Court stated:

This Court has already pointed out on a number of occasions that in the social, economic and political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice.<sup>70</sup>

Even more recently, we find the following statements in *R. v. Mills*: "Thus courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention,"<sup>71</sup> and, in *M. v. H.*: "Courts are simply ill-suited to manage holistic policy reform."<sup>72</sup>

While the Supreme Court was reluctant to resort to the legislative record to determine legislative intent in an early Charter case,<sup>73</sup> statements in recent years<sup>74</sup> suggest more openness to examining not only the legislative record but also extrinsic materials of other kinds that would give evidence of the mischief that the legislation sought to cure.

Some have suggested that there is a dialogue taking place between the courts and Parliament that allows each to have input on particular policy issues as they work towards the best solution.<sup>75</sup> The Supreme Court

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<sup>69</sup> For a discussion of this issue, see, e.g., Greene, *The Charter of Rights* (Toronto: J. Lorimer, 1989), at 62-69 and 222.

<sup>70</sup> *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at 605-06. See also *Andrews v. Law Society of British Columbia*, *supra*, note 63, at 194; *Egan v. Canada*, [1995] 2 S.C.R. 513, at 575-76.

<sup>71</sup> *R. v. Mills*, [1999] 3 S.C.R. 668, at 711.

<sup>72</sup> *M. v. H.*, [1999] 2 S.C.R. 3, at 170-72, *per* Bastarache J.

<sup>73</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

<sup>74</sup> *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at 483-84; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at 242-43 and 333.

<sup>75</sup> Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75; Ryder, "The Supreme Court's Role:

itself has expressly accepted this characterization in at least two recent cases and goes on to suggest, in both those cases, that such a dialogue enhances the democratic process.<sup>76</sup> Others claim that this dialogue theory has been overstated; that the dialogue goes in one direction only and that the courts have effectively been issuing orders that Parliament must obey.<sup>77</sup> Christopher Manfredi asserts what he calls the “paradox” whereby, in Canada, as in other countries, judicial supremacy is overtaking constitutional supremacy and thereby diminishing our capacity to govern ourselves through our conventional political process.<sup>78</sup> It is not clear, in any event, that Parliament and the other legislatures are yet taking full advantage of the dialogue that the Supreme Court believes exists.

Indications from the Supreme Court that it will sometimes defer to the legislatures, that it is open to seeking extrinsic evidence of legislative intent and that it is thinking in terms of a dialogue with the legislatures would all suggest the wisdom of governments, through Parliament and the other legislatures, making very transparent the policy considerations that underlie the decisions and approaches taken in legislation, as well as the evidence that support these decisions. Governments would be wise to pay particular attention to contextual arguments based on balancing other societal interests that they might make under section 1 of the Charter or under the rights section itself. It is likely that courts will be much more receptive to arguments along those lines than to arguments that are directed only at limiting the scope of entrenched rights.

Although these theories have been developed in Charter cases, they evidence a way of thinking on the part of the Court that could probably apply, at least to some extent, in relation to cases involving Aboriginal and treaty rights. Therefore, governments would also be wise to pay particular attention to arguments based on justifications for limitations on the rights under section 35 rather than relying primarily on arguments relating to the scope or existence of the rights. In relation to

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Too Much Power?” (2000 Constitutional Cases, Professional Development Program, Osgoode Hall Law School, York University, 6 April 2001), Tab 12.

<sup>76</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 566 and *R. v. Mills*, *supra*, note 71, at 711.

<sup>77</sup> See, for example, Morton and Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

<sup>78</sup> Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills, Ontario: Oxford University Press, 2001).

section 35 rights, the courts have put an added emphasis on negotiation so this would be an important factor in determining whether limitations on these rights are justified.

Before leaving this section there is another aspect of the relationship between the legislatures and the courts that should be mentioned. Sometimes it appears that courts are filling in on policy decisions where governments have failed to do so,<sup>79</sup> or have failed to do so with enough speed. We have already noted that, even before 1982, courts have from time to time taken a leap in the law that has no precedential or legislative basis. Now that we have entered a rights age when a balancing of competing values has become the norm, occasions for the courts to take such leaps have become more numerous.

In the area of Aboriginal and treaty rights, where nothing but the barest affirmation was included in section 35, there was enormous scope for the courts to take charge and move the agenda along. It is well recognized that Aboriginal communities are often among the most vulnerable in Canadian society, living sometimes in shocking circumstances of poverty and despair. Since both the courts and the legislatures have a role to play in seeing that the rights of the Aboriginal peoples are fully accommodated, if Parliament and the legislatures appear not to be moving as quickly as they should to advance the situation of Aboriginal peoples, it is natural that the courts will do so using their only tool at hand, namely a judicial pronouncement on rights. Decisions like *Sparrow*<sup>80</sup> and *Marshall*<sup>81</sup> were turning-point cases. New ways of interpreting Aboriginal rights were established that pushed governments to pay more attention to these rights.

As with the Charter, it will be important for governments to find ways to make transparent the various considerations that go into the policy choices that it makes in relation to Aboriginal and treaty rights so that the courts can be assured that the governments are doing what they can to accommodate rights and interests in a timely way.

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<sup>79</sup> See, for example, *Vriend v. Alberta*, *supra*, note 76, at 575-76 where a statement by the Government of Alberta was interpreted by Cory and Iacobucci, JJ. as a “deference” to the Court to decide whether sexual orientation should be added as a ground in Alberta’s human rights legislation. They say “The Government responded to this recommendation by deferring the decision to the judiciary.”

<sup>80</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>81</sup> *R. v. Marshall No. 1*, [1999] 3 S.C.R. 456.

## VI. ROLES AND RESPONSIBILITIES OF GOVERNMENT

The Government of Canada, and other governments in Canada, have multiple roles and responsibilities. The most fundamental duty of government is to promote the general public interest and to do the best it can for all Canadians. That includes the duty to make the best public policy decisions that it can and to spend wisely, and carefully, its taxpayers' money. The government has the duty to uphold the rule of law, democratic principles and other values fundamental to Canadian society.

At the same time, the Government of Canada, and other governments in Canada, have a duty to protect the interests that are identified in our Constitution as warranting special protections. These include the Charter rights and the Aboriginal and treaty rights already discussed. They also include a number of group rights that have developed in Canada's own historical context. These are sometimes cast as individual rights but have the interest of a minority group at the core. There are protections afforded to Canada's two official languages, French and English, as well as schooling rights granted to minority populations of those two linguistic groups. In several provinces, special religious schooling rights continue to exist. Finally, there are all the statutory obligations created by Parliament and the other legislatures, as well as contractual obligations undertaken by governments that must be met.

Governments must take all these factors into account when they make social or economic policy decisions, when they decide how to spend money, when they decide whether to accede to the requests or demands of a particular individual or group of citizens and when they decide how to respond to the threat of litigation.

The world of governing has become very complex and the emergence of a rights culture is very much a part of this complexity. A positive aspect of the recognition of the importance of rights is that governments are paying much more attention to the impact of their decisions on existing rights. At the same time, however, there is concern that this attention to rights is carrying with it some costs.

## VII. CONCERNS RELATING TO THE PROCESS OF GOVERNING

Politicians, policy-makers, government advisors and government watchers in general have voiced a variety of concerns about possible negative results flowing from the need to ensure that constitutionally entrenched rights are respected. Some of these concerns are explored in



this section. The extent to which they are grounded in experience cannot be determined in the abstract. However, as a first step it is important to attempt an articulation and understanding of the concerns that are expressed so that they can either be dealt with or laid aside.

### **1. A General Increase in Litigation — Mega-cases Against Governments**

There is a perception, particularly in government circles, that the increased emphasis on rights, resulting in part from the constitutionalization of certain rights has led to increased litigation in general and increased expectations of government responsibility in particular. Governments have been named as defendants in huge lawsuits, sometimes resulting from events long past.

It is undoubtedly true that Canadians have become increasingly litigious against each other as individuals, against private organizations and against governments. This phenomenon is not unique to Canada and is one that has drawn considerable attention. The entrenchment of rights in the Constitution has likely enhanced the tendency to litigate, thereby augmenting the volume of litigation even beyond the additional litigation flowing from the newly recognized rights themselves.

For some years, a reaction to this situation has been developing. People are trying to find ways to avoid resorting to the courts. The all-or-nothing, winner-take-all approach to dispute resolution is questioned by citizens in relation to disputes amongst themselves. Governments are asking the same questions.

Some very large claims have been made against governments in recent years. Many of these claims have nothing to do with Charter rights or Aboriginal and treaty rights. However, because these claims are arising at the same time as governments are coping with the large volume of claims based on entrenched rights, there is a tendency to confuse the two types of cases. It is very important to distinguish between them. There is nothing new in principle about claims arising from alleged wrongs inflicted by governments on groups or individuals. Similar actions could have been instituted long before 1982 under our general tort, contract or statutory law, depending on the circumstances of the case.

One recent example of mega-litigation affecting the Government of Canada that does not arise, at least primarily, from constitutionally protected rights<sup>82</sup> is the “hepatitis C” litigation, arising from difficulties

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<sup>82</sup> That is not to say that the entrenched rights may not be raised in relation to some aspect of these cases or, some time in the future, in

with the blood system. Another is the many individual lawsuits relating to the treatment of Aboriginal children in residential schools. These lawsuits are directed against other parties as well as governments. In the case of the residential schools, governments were involved in establishing, monitoring or regulating them while churches operated the schools. The governments may be particularly vulnerable to such suits since citizens tend to look first to governments for assistance both because of their relationship to governments and because of the financial resources available to governments.

One concern that is often expressed about some of the mega-litigation that the government is facing, is that too much emphasis is being put on sins of the past that cannot be changed, especially if recent governments had no involvement in those sins. General observations are made that litigation is not the best way to address past wrongs since it inhibits us as a society from moving ahead. On the other side, views are put forward that without some formal action, like litigation and compensation, deeply-felt grievances will not be adequately addressed. There is a need for a tangible acknowledgment of past wrongs by governments and society at large that goes to the very core of the self-respect of the individuals or groups who were aggrieved, or who represent those who were aggrieved. These are important issues and they need to be explored, but it is important to understand that these cases do not flow directly from the entrenchment of Charter rights or of Aboriginal and treaty rights.

Depending on policy choices by governments involved in some of this mega-litigation, there may be solutions available to governments to limit their liability that would not likely be available in litigation arising from the entrenched rights. For example, it might be possible to invoke existing statutory limitation clauses in certain cases. Alternatively, it might be possible to diminish or remove liability through new legislation. These approaches, particularly the latter, might themselves be susceptible to legal challenge, including Charter challenge, but they are avenues that could be explored in ordinary litigation. Of course, such approaches may be politically quite unpalatable. What is important is that, in making decisions on what options to explore, governments clearly understand whether they are making their decisions on legal grounds or on policy or political grounds.

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relation to the way these claims are ultimately resolved. But the point here is that the source of these claims is the ordinary law, not the entrenched rights.

It is important to dispel perceptions that put more problems at the feet of entrenched rights than rightfully belong there. The way is now open to move on to those concerns that *do* relate to entrenched rights as such.

## **2. A Loss of Control**

The issue of the power shift from governments and legislatures to the courts was discussed at some length in the section on the role of the courts. That is one way — how issues are resolved — in which control can be seen to be lost by governments as a result of rights litigation. There are others. Another concern frequently expressed is the loss of control by the government of its own agenda. Rights cases frequently receive a great deal of media attention necessitating, in turn, the direct attention of politicians and government officials.

Perhaps the most disquieting aspect of rights claims for governments is the randomness with which many of these claims seem to come up, particularly those under the Charter. There are, of course, many situations where cases can be foreseen (for example in rapidly developing areas such as equality claims relating to sexual orientation) but the Charter allows for many unexpected claims as well.

Another concern is that governments are losing control because of the sheer volume of these rights cases. This is particularly true of the cases relating to Aboriginal and treaty rights.

There is no magic solution to any of these concerns. Governments cannot simply resign themselves to this loss of control, but must continue to seek ways to manage the unpredictability and volume of these cases. One approach would be to increase communication between governments and rights holders so as to broaden their input into government decisions at an earlier stage. This might succeed, in some cases, in moving the focus of the relationship between governments and rights holders towards negotiation and solutions rather than to the adversarial approach of litigation.

## **3. A Dampening Effect on Policy Decisions**

A frequently heard suggestion is that the very existence of the Charter and section 35 is inhibiting good policy initiatives. If this is the case, the social costs, while not susceptible to precise measurement, could be significant. The claim is that there have been policy initiatives that should have gone ahead, but have not gone ahead for fear of complex litigation to

follow, or, alternatively, that the initiatives that have succeeded in going ahead, have been so watered down as to significantly reduce their efficacy.

On one level this concern amounts to an inquiry into the ability of the government to make effective policy decisions. This would include the question of whether it is weighing its legal risks effectively. At the same time, it may be that the most important result of the second thought given to policy initiatives is an overall improvement in the quality of those initiatives that do go forward.

In order to assess the dampening effect properly it would be necessary to track the progress of actual policy initiatives to determine to what extent the existence of entrenched rights *do in fact* inhibit policy initiatives. It is certainly true that initiatives are subjected to constitutional scrutiny in the normal course within government. To balance this concern it would be necessary to track, as well, how many policy initiatives that did not go ahead as originally proposed were *appropriately prevented* from doing so. It would be important to identify, in either case, the reasons why policy initiatives that did not go ahead could not be adjusted to meet constitutional requirements; whether, for example, the problem related to political concerns, costs, administrative burden or something else.

An initiative might be withdrawn because it is underinclusive. A rights assessment might lead to the conclusion that the program under consideration had to be broadened beyond the class of citizens originally contemplated in order to provide benefits to a broader range of individuals. In the context of available funding, the benefits might then be so thinly spread that the program would cease to be effective. It would be informative to determine whether such a situation has ever actually arisen. If it has, it would be instructive to consider why the government wished to grant benefits to the narrower group and the government's rationale for drawing the line where it did. We have seen, earlier in this paper, that the courts, particularly the Supreme Court, are asking similar questions. Governments would be well advised to ensure that they have good answers for these questions when they develop any new benefits programs.

Another way an initiative could be withdrawn might be as a result of an intense political lobby. It may happen that pressure groups couch their objections in terms of rights even if rights are not the real issue. It would be useful to determine if this type of situation has occurred often, if at all.

To put into perspective the general concern that rights have a dampening effect on policy initiatives, perhaps it is worth observing that

many policy initiatives of governments may move ahead with minimal interface with entrenched rights. One could mention, for example, balancing the budget, international trade issues, health care issues, energy issues, environmental issues and federal-provincial relations. All of these will touch rights issues from time to time, but rights issues would likely not predominate. Therefore, it would be instructive to gather data on the proportion of policy initiatives that actually do engage rights issues to a significant degree.

#### **4. Concerns About Other Legitimate Interests**

Fairly closely related to the concern about a dampening effect is the concern that a focus on rights is interfering with the consideration of other interests that do not have the status of rights. There are a number of different facets to this concern.

From one point of view this may amount to a suggestion that some of the rights that have constitutional protection do not merit inclusion. There is not much to be done about this aspect of the concern short of a constitutional amendment (involving political actors across the country) or resort to the “notwithstanding clause” in section 33, if available. Resort to section 33 would seem, in most instances, to be inappropriate to cover a situation of such generality.

Conversely, this concern may amount to a suggestion that certain other interests ought to be protected at the level of rights. Again, there is no immediate action that can be taken to remedy that situation short of a constitutional amendment to include the interest in question. It should be noted, though, that the balancing that takes place under section 1 and other sections of the Charter already provides a mechanism to have these other interests taken into account.

Sometimes this concern takes the form of a complaint that rights have coloured the way governments are seeing the world in such a way as to lead them to less than optimal policies and actions. It may evidence a deeper feeling that there is something wrong with a social structure that requires that everything be seen through a “rights” lens. It may also simply be a cry of frustration resulting from having to take rights seriously. The last suggestion may be closest to the truth, because it is difficult to find a basis on which to agree that the government is looking through a distorted lens when it takes rights into account in its decision-making.

Taking a somewhat different approach, sometimes the question arises as to whether there are any situations where a government action that

does not fully accommodate protected rights could ever be justified as being itself beneficial. In other words, can “good works” ever amount to a legitimate trade-off against existing rights? As has already been observed, governments do have access to balancing tests under section 1 and certain other sections of the Charter and can balance competing interests in relation to Aboriginal and treaty rights provided they can meet the justificatory tests articulated by the courts.

It would be informative to inquire into what sorts of things would qualify as “good works.” They would likely have to be directed at some disadvantaged group. Perhaps alleviation of poverty in some direct way would qualify in certain circumstances. It may be that some rights are more susceptible than others to this type of an analysis. It is not easy to imagine a situation where section 15 of the Charter (equality rights) might be diminished by some other interest, since the essence of that right is to treat all individuals as equally deserving of the government’s care and concern.

Some ask whether deserving groups or individuals whose interests are not protected will simply get lost in the shuffle. One response is that the existence of rights for some is not likely to prevent assistance for others. Charter rights, in particular, are set out as protections, not requirements. Furthermore, subsection 15(2)<sup>83</sup> of the Charter (affirmative action) would seem to provide some legal basis, either through that subsection itself or through its effect on subsection 15(1),<sup>84</sup> to assist some of these forgotten groups so long as the assistance within those groups is not given in a discriminatory way.

In order to assess the concern about groups or individuals being overlooked, it would be necessary, if the concern is just a general one, to give serious thought to who it is that might be forgotten. If we cannot find an answer to that question, the concern has no practical effect. If we can, then we may have something to work on, either by broadening the scope of our initiative or by addressing the new problem in whatever

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<sup>83</sup> Subsection 15(2) reads as follows:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>84</sup> See *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at 1003-11, where it is suggested that at our current stage of jurisprudence, subsection 15(2) should likely be handled through subsection 15(1).

way is appropriate. It would be necessary to have an appreciation of the specific case to find the appropriate approach.

Suggestions have been made that the expenditure of resources to accommodate rights or to compensate those whose rights have been infringed will take away our financial capacity to deal with more pressing social problems (or otherwise divert us from these problems). One wonders first whether there are more pressing social problems than those that relate to needs that have already been recognized to be deserving of constitutional protection. One also wonders how real these suggestions might be on a practical level in any event. Would one not more likely expect to find a positive correlation between the constitutional recognition of individual and minority rights in a particular country and a progressive record of social policy advances in that country? Most Canadians would agree to, and take pride in, the fact that ours is a progressive record.

There are no absolute answers to the questions raised in this section, but they are important, and it is important to ask them and to probe the concerns that underlie them. Equally important is the recognition that the rights entrenched in our Constitution are here to stay and governments must respect them, even as they seek to ensure that other interests are taken into account and that the public interest is met.

### VIII. THE IMPACT OF RIGHTS ON SOCIETY

The previous section dealt with the impact of rights on the act of governing. Broader concerns are raised outside government as to the impact of rights on society itself. This section will look at some of them and will conclude by referring to recent literature on the subject in fields other than law. To put the concerns into perspective, however, some general observations must first be made on the advantages to society of the constitutional recognition of rights.

Most people would agree that it is a good thing for a society to have an articulated set of values. Most would agree, as well, that it is important to provide special protections for those members of society who are, for one reason or another, in a weakened position. The recognition and protection of rights serve a number of different purposes. The most commonly recognized purposes are to protect individuals from the unchecked power of the state and to protect minorities from the domination or disregard of majorities.

There are more subtle advantages to the protection of rights. The recognition of individual rights in the fundamental law of a country

formalizes the democratic principle of the worth of each individual and articulates certain core values of that country.

With respect to group rights, the mere fact that a minority group is mentioned as deserving of protection can add to the sense of self-worth of that group and encourage, among the members of the group, a sense of belonging both within the group and within the broader society. Beyond the obvious advantage of having the rights themselves, the very recognition of the rights can provide motivation to a disadvantaged group to improve the circumstances of their lives generally. The recognition of their rights can also add to the sense of commitment on the part of minorities to society at large. This can only be beneficial to everyone.

Recognition of individual or group rights gives the rights-holders a voice that they may not have had before. It legitimizes their concerns. Without these rights there may be no way for them to get the attention of governments that they require.

It has been mentioned already that Canadians are very proud of the rights that are protected in our Constitution. The Charter, conceived as a unifying force, has probably gone some way in achieving that goal. At the same time, not all reactions to our rights are positive.

Concerns that are raised by citizens are usually not fundamental. They relate more to the way our rights are being interpreted than to the existence of the rights themselves. Some worry, for example, that the wrong balance has been struck, in the protections afforded an accused under the Charter, between those accused of crimes and victims of crime.

At a broader level, it has been suggested that powerful groups in society, such as corporations or wealthy litigants, are in a better position to be able to assert their claims than those who are truly in need, sometimes even to the detriment of the interests of the disadvantaged. Related to this is the suggestion that the weaker groups in society must turn their cases over to lawyers and the legal system, thereby losing a direct relationship with their own issues as these issues are being resolved. The point of these concerns is the suggestion that, without a general restructuring of our society, the full effect of the entrenched rights can never be achieved.

Sometimes fears are expressed that rights, by being written down, lie open to being diminished by an attitude of strict adherence to the letter of the law rather than being given a generous interpretation. Governments might be tempted to see these rights as ceilings, not floors. In a similar vein, one might argue that once rights are recognized and entrenched, they may



be taken for granted in such a way as to close off creative thinking around the issues that lie under the rights.

Sometimes the suggestion is made that, even within a rights-holding group, whether that group is a minority within the scope of section 15 or an Aboriginal group protected under section 35, there may be disadvantaged sub-groups within those groups whose interests are dismissed or ignored. In this scenario, the minority would become a majority in relation to the sub-group. The fear is that such a situation would be harder to expose and rectify than that of a primary minority.

None of these concerns should be ignored. They reflect an honest desire to ensure that rights are fully respected in individual cases. Concerns are also being expressed on a broader level. These relate to the effect that the existence of rights may be having on the way that citizens relate to their society as a whole.

Some say that too much attention is given to “rights talk” and not enough to broader issues of concern to society at large. Joel Bakan, in his book *Just Words*,<sup>85</sup> captures this concern even in the title, with its play on words. He suggests that to focus on rights is to miss the big picture. One might miss the underlying problems or issues if one looks only as far as the rights. Rights are just a very small piece of the puzzle that is society. Bakan sums up his thoughts in the following way:

The struggle for social justice is much larger than constitutional rights; it is waged through political parties and movements, demonstrations, protests, boycotts, strikes, civil disobedience, grassroots activism, and critical commentary and art.<sup>86</sup>

What this author underplays, it would appear, is the fact that the Charter has moved our social agenda forward. It has had a significant impact on protecting rights, particularly those of minorities and those included in section 15. A similar comment can be made in relation to section 35, Aboriginal and treaty rights.

In a related vein, there are those who would suggest that a focus on rights, as well as diverting our attention, actually interferes with a true attempt to solve societal problems. Allan Hutchinson argues, in his book *Waiting for Coraf*,<sup>87</sup> that to focus on rights is to divert us from the more

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<sup>85</sup> Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

<sup>86</sup> *Id.*, at 152.

<sup>87</sup> Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

fundamental need to talk to each other, to engage in a “democratic conversation.” He says:

Rather than settle for the attenuated discourse of rights-talk, people must aspire to a truly democratic polity that will enable and oblige them to become full and contributing citizens in an expansive civic dialogue over the terms and conditions of social life and personal living.<sup>88</sup>

Bakan suggests that Hutchinson does not pay enough attention to the fact that social forces colour “democratic dialogue” just as the “rights discourse” is constrained by the system within which it operates.

The need to see ourselves as interconnected with other citizens is a theme that comes up frequently in relation to concerns about an undue emphasis on rights. One often hears the comment that to focus on our own rights is to lead us to neglect our responsibilities to others. Some of the ways this general thought is expressed are discussed below.

In an unlikely article on postmodernism,<sup>89</sup> reviewing a work by Michael J. Trebilcock on economic theory, Allan Hutchinson expresses these concerns in an interesting way. In propounding his own views on rights and citizenship, he stresses the organic nature of society and pleads that citizens should not see others as threats to their own freedom and fulfilment. He points out that the fate of all of us is interconnected and that a focus on rights creates barriers that separate people. He proposes that instead of the “me/they” dichotomy that flows from a focus on rights, we move to a “me/we” approach. Context, he says in true postmodern form, is always important. There can be no absolute rules.

Michael Ignatieff, in *The Rights Revolution*,<sup>90</sup> speaks about our general approach to, and relationship with, society. He explores the importance of reconciling different claims and recognizing the validity of opposing claims. He underlines the need to find a way to enhance our solidarity as a country in the midst of all the competing claims. We need to feel a connection to others from other groups in our society and to feel that their wins are our wins.

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<sup>88</sup> *Id.*, at xii.

<sup>89</sup> Hutchinson, “Michael and Me: A Postmodern Friendship” (1995), 33 Osgoode Hall L.J. 237-58.

<sup>90</sup> Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000).

Alan Cairns, in *Citizens Plus*,<sup>91</sup> picks up a similar theme in relation to Aboriginal peoples. He argues that our dialogue has gone too far in recognizing the separateness of Aboriginal groups and stresses the importance of seeing Aboriginal peoples as Canadian citizens as well as Aboriginal persons. It is important, he states, to address the issue of how the overall Canadian community will co-exist with Aboriginal self-government. It is important to understand what holds us together and what obligations we have to each other.

Attempts have been made to develop theories that can accept the legitimacy of constitutionally protected rights while at the same time recognizing the need to take other competing interests into account. One such attempt was made in a book called *Rights and Responsibilities*<sup>92</sup> by Leon Trakman and Sean Gatién. Their approach was to develop a theory of “internal constraints,” which they characterized as “responsibilities,” that limit and define the content of rights. These “internal constraints” would apply in addition to any “external constraints” established by law and would be determined in the first instance by the rights-holder. Very important to their theory was their belief that the state is not able to determine what is necessary to protect social interests.

Therefore, in the final analysis, it would appear that the content of the “internal constraints” would have to be determined by the courts, but without state intervention. How or why the courts would take jurisdiction is not explored.

Another Canadian author who appears to be thinking along similar lines is Mark Kingwell. In his book, *The World We Want: Virtue, Vice and the Good Citizen*,<sup>93</sup> he explored the concept of friendship from Greek philosophy and focused on a new type of citizenship that carries with it a duty to participate in political dialogue with other citizens on the basis of mutual respect and compassion. He saw rights as valuable tools but believed that litigation undermines communities. He proposed an emotional citizenship, rather than an intellectual one, and believed that engaging in a process with other citizens would lead us to a better society.

What appears to underlie both the theory of Trakman and Gatién and the philosophy of Mark Kingwell is, once again, a desire to move towards a

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<sup>91</sup> Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

<sup>92</sup> Trakman and Gatién, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999).

<sup>93</sup> Kingwell, *The World We Want: Virtue, Vice and the Good Citizen* (Toronto: Viking, 2000).

society where the individuals in it communicate with each other and accommodate each other's rights and interests. Whether these proposals could actually be put in place is probably not of primary importance. These authors simply suggest a way of approaching conflicts to avoid some of the problems they see in a rights-oriented society.

The issue of how to respect individual and group rights, while at the same time maintaining the commitment of all citizens to their larger community and to their country, is central to much of the discussion on the subject of rights. Although not articulated in quite the same way as are the concerns expressed by politicians and government officials, they form a backdrop against which those concerns can be understood in a more profound way.

#### IX. CONCLUSION

This paper examines the impact of the entrenchment in our Constitution of the Charter and of Aboriginal and treaty rights. It has sought to understand these new rights within the context of our legal system. Several of the cases that have had a significant impact on governments have been examined.

The paper has examined the role of the courts and the role of governments. It has exposed a number of concerns about entrenched rights from a government perspective, and has tried to examine these concerns in a balanced way. The extent to which the concerns are real or perceived, serious or minor, cannot be determined entirely in the abstract, but will require a critical examination of the way decisions are actually taken in government. This paper has also tried to provide a broader context for those concerns by examining briefly some of the ideas that are being expressed more generally about the effect of rights on our society. It is hoped that this type of inquiry will enhance our understanding of the challenges that we face.

There is little doubt that the process of governing has become more complex since the *Constitution Act, 1982*. However, most would argue that the entrenchment of new rights has had a net beneficial effect on our society. In any event, governments will continue to make policy decisions on behalf of citizens, and individuals and groups will continue to press for their rights. Courts will continue to adjudicate in this sphere. The more we can understand about the dynamics of these relationships, the better all sides will play their parts.

It will be important for those involved in making policy decisions, who feel in any particular instance that they are being driven to a

solution that is less than optimal, to communicate the specific details of how they believe this to be the case. Only then can we determine whether policy choices are actually being distorted when rights are involved, and, if they are, what values are not being accommodated. Without an honest assessment of what is really at stake we will never be comfortable that the right choices are being made.

We should face these tasks with a level of optimism. We are well placed, as Canadians, to delve into these issues. Fundamentally, we are proud of the fact that rights are protected in our Constitution. Therefore, we are unlikely to conclude that our concerns outweigh the value of having these rights.

Canada is a leader in recognizing the need to accommodate group rights as well as individual rights. Canadians are widely sought by other countries as consultants on minority rights issues. One could mention, for example, Will Kymlicka,<sup>94</sup> Charles Taylor<sup>95</sup> and Michael Ignatieff.<sup>96</sup> We are used to these issues. We value the diversity in the multiple cultural heritages of our citizens. We have taken care to ensure that both official languages, French and English, are used and flourish and that the minority communities that speak those languages have the support they need. Our efforts have given us a wealth of experience in protecting minority group interests. We are working with the Aboriginal peoples of Canada to find solutions to some of the problems in their communities as we struggle to understand fully the implications of the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982*.

Finally, rights are with us to stay and it is incumbent on us to improve our ways of dealing with them. A first step in that direction is to develop a deeper understanding of our concerns and the next step is to examine

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<sup>94</sup> Will Kymlicka is a professor of philosophy at Queen's University. Among his more recent works on minority rights are *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), and "Human Rights and Ethnocultural Justice" (1998), 4(2) *Review of Constitutional Studies* 213.

<sup>95</sup> Charles Taylor is a professor of political science at McGill University. Among his recent publications is *The Malaise of Modernity* (Concord, Ontario: Anansi Press Limited, 1991). It comprises the 1991 Massey Lectures.

<sup>96</sup> Michael Ignatieff is a Canadian-born writer and historian who is currently a visiting professor at Harvard's Kennedy School of Government. His recent publications have been cited earlier in this paper. See notes 57 and 90.

these concerns on a practical level so that we can discard the false problems and deal with the real ones.

For now, if this paper succeeds in articulating some of the concerns felt by those involved in making policy decisions in a rights culture, and in shedding some light on them, it will have achieved its purpose.