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# DOES CANADA NEED A POLITICAL QUESTIONS DOCTRINE?

D. Geoffrey Cowper, Q.C.\*  
Lorne Sossin\*\*

## I. INTRODUCTION

The steady march of controversial issues onto the Supreme Court docket continues to bewilder, confound and amaze observers. The challenging and compelling character of the claims made before the Court, and the breadth of possible judicial responses, has made the search for limiting institutional principles both timely and controversial. The debate over the proper reach of the Court's jurisdiction is an important and a delicate task. While a number of critics lament the Court's foray into the policy arena, many appear motivated primarily by disagreement with the outcome of the Court's judgments.<sup>1</sup>

There are, however, legitimate points for debate concerning the Court's definition of constitutional rights, as well as its determination of available judicial remedies for unconstitutional conduct. The difficulty, as always, lies in distinguishing between questions which the courts must resolve, no matter how politically sensitive, and those cases where the judiciary should decline to address the issue on the basis that it is not a proper question for adjudication by the courts.<sup>2</sup>

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<sup>1</sup> For example, see Roach, *The Supreme Court on Trial* (2001); Morton and Knopff, *The Charter Revolution & The Court Party* (2000); and the review of this book by Sossin, *Courting the Right* (2000), 38 Osgoode Hall L. J. 531-41. See also Bayda C.J., Saskatchewan's, speech at the Act of Settlement Conference, Spring 2001, Vancouver, for a spirited defence of the Court's Charter jurisprudence: British Columbia Superior Courts <<http://www.courts.gov.bc.ca/1701/welcome.htm>> (date accessed: April 9, 2002).

<sup>2</sup> There are a number of doctrines aside from political questions which might prompt the Court to decline jurisdiction, including ripeness, mootness or a lack of standing. For a discussion of justiciability in this wider sense, see Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (1999). On the relationship between political questions and justiciability more directly, see Tremblay, *Les tribunaux et les questions politiques — Les limites de la justiciabilité* (1999).

While the Court has in different contexts expressly recognized the importance of staying within the judicial role contemplated under the Canadian Constitution (most notably reiterating that it is not the province of the Court to second-guess the wisdom of legislation or government action), we will argue that it has not yet established clear and transparent principles either in the expression of that role or its application. In this paper, we divide our analysis into the following three sections. First, we offer a definition of a political questions doctrine and summarize the experience in the United States dealing with a similar exercise in seeking to develop a political questions doctrine. The body of case law in the United States concerning political questions is potentially valuable as an example of how a similarly situated judiciary has come to grips with the judicial response to political controversies. In the second section, we seek to extract from the American experience lessons which might be applicable to Canada, with appropriate accommodation for our distinctive jurisprudential traditions and Constitution. Finally, in the third section, we examine the Canadian experience and review the Court's position with respect to political questions as evidenced in its recent judicial work.

## II. THE QUESTION OF DEFINITION

It may be useful to define what is meant in this context by a "political question." Although the term has been used in many different ways, for our purposes we take it to mean the following: A question which arises in litigation and which by express or implied constitutional principle is excluded from judicial determination and left for resolution by other organs of government. A political question may dominate the case before the Court or merely form an aspect of the controversy. In the Charter context, political questions may circumscribe the Court's elaboration of a Charter right, or may animate the Court's approach to section 1.<sup>3</sup> Similarly, in some circumstances, a political question may only arise in the context of the Court's selecting an appropriate remedy for breach of an established constitutional right.

It bears emphasizing that many cases raise controversies which may be "political" in the broadest sense of the term, but do not concern political questions in the sense meant here. The most difficult problem of definition arises when the Court rules on the scope of constitutional rights. Since the Constitution is the "supreme law" of Canada, its interpretation and application falls to the

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<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

courts to adjudicate.<sup>4</sup> The recent decision in *United States v. Burns*,<sup>5</sup> which we discuss below, represents an example of a Charter case which squarely raises concerns over the political questions doctrine. However, in this case, as in others which bear on the boundaries of judicial intervention, the Court fails to articulate the values or criteria which guide its judgments in relation to political questions.

Even in a case such as the 1998 *Secession Reference*,<sup>6</sup> where the Court crafted Solomon-like political compromises on the clarity of referendum questions and majorities — and the duty to negotiate the Court declined to address its political role directly. The Court suggested that it was engaged only in applying the relevant standards of constitutional and international law. While the Court clearly operates with a political questions doctrine in mind, it has yet to find a coherent voice for articulating that doctrine.<sup>7</sup> Inferences from what the Court actually does is not conclusive in such a complex area. What is clear in our view is that simple characterizations do not serve the need to delineate the important boundary between judicial decision making and legislative debate and policy determination.

### III. THE U.S. EXPERIENCE

The American doctrine has its origins in the early cases which developed the scope of judicial review implied by the terms of the U.S. Constitution and the continuing tension created by the Jeffersonian ideal of a constitution upheld by an informed and active citizenry.

Based on the principle of the separation of powers, the political questions doctrine limits judicial jurisdiction, and therefore power, in a number of circumstances where the other branches of government have a stronger claim to decide the issue raised. It must be remembered that the very legitimacy of judicial review of legislation on constitutional grounds was not expressly addressed in the United States Constitution. Indeed, it was Jefferson's view,

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<sup>4</sup> See *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at 472, *per* Wilson J., and 459, *per* Dickson J. (as he then was).

<sup>5</sup> [2001] 1 S.C.R. 283.

<sup>6</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [“*Secession Reference*”].

<sup>7</sup> The closest the Court came to such an articulation in the *Secession Reference* was its summary of the circumstances under which the Court may decline to answer a reference question on the basis of “non-justiciability”, which were held to include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government; or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law (*ibid.*, at para. 26).

successfully defeated by John Marshall, that the legislatures must be trusted themselves to avoid exceeding their constitutional powers, with the sole remedy being the democratic sanction of an electorate determined to keep the constitutional division of authority respected.<sup>8</sup>

The doctrine first arose in *Luther v. Borden*,<sup>9</sup> a case arising out of the Dorr rebellion, a domestic uprising in the state of Rhode Island. The Supreme Court, having been asked to recognize the Dorr regime as the legal government at the time of the dispute, stated:

Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals.<sup>10</sup>

But while federal courts had no jurisdiction over the question, neither did the state courts:

[W]e do not see how the question [of which government is legitimate] could be tried and judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try.<sup>11</sup>

The Supreme Court went on to identify the authority through which the dispute can be addressed:

[T]he Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.<sup>12</sup>

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<sup>8</sup> Smith, *John Marshall, Definer of a Nation* (1996), at 465-67.

<sup>9</sup> 48 U.S. 1 (1849).

<sup>10</sup> *Ibid.*, at 40.

<sup>11</sup> *Ibid.*, at 39-40.

<sup>12</sup> *Ibid.*, at 42.

More than a century later, the doctrine expressed in *Luther* was given its modern expression and form in *Baker v. Carr*,<sup>13</sup> a dispute over legislative apportionment in Tennessee. Although no “political question” was identified in the substance of the case by the majority, Brenner J. identified the characteristics of a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>14</sup>

Rather than a comprehensive statement of principle, this summarizes various bases which would lead to a decision not to decide a particular question. Lawrence Tribe has proposed that three separate models emerge from this passage: the Classical model, consisting of the first clause; the Functional model, being the sum of the second and third clauses; and the Prudential model, consisting of the final three clauses.<sup>15</sup>

Since we are only concerned with the potential for lessons from the American experience, it is sufficient to observe that these different principles include notions of express textual assignment, appropriateness of judicial methodology, and, finally, deference to other branches of government. As we will see, in the Canadian experience each of these themes has been advanced and considered, but in piecemeal fashion, without being recognized as elements of a coherent doctrine.

A review of some of the U.S. case law in which these considerations have been present illuminates the concerns over assignment, appropriateness and deference. One of the most forceful proponents of judicial deference (and of the Prudential model) to elected bodies, Felix Frankfurter, wrote in *Colegrove v. Green*, a decision later overturned by *Baker v. Carr*, that:

We are of the opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about “jurisdiction.” It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our

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<sup>13</sup> 369 U.S. 186 (1962).

<sup>14</sup> *Ibid.*, at 217.

<sup>15</sup> Tribe, *American Constitutional Law* (2d ed, 1988), at 96.

government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.<sup>16</sup>

In *Baker v. Carr* itself, Frankfurter J. expanded on his Jeffersonian theme in dissent:

In this situation, as in others of like nature, relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that scars the conscience of the people's representatives.<sup>17</sup>

After Frankfurter J. left the Court, the Prudential model faded from the reports until another apportionment case came before the Supreme Court, this time disputing a political gerrymander in Indiana. Justice O'Connor, writing in a concurrence with Burger L.J. and Rehnquist J.R. in *Davis v. Bandemer*, stated that

the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out — by the very parties that are responsible for this process — present a political question in the truest sense of the term . . . To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues . . . I do not believe, and this Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed.<sup>18</sup>

In *Coleman v. Miller*,<sup>19</sup> the importance of a constitutional foundation for a judicial rule was considered in the context of a judicial determination of a time limit for the ratification of a proposed amendment to the U.S. Constitution: "Where are to be found the criteria for such a judicial determination? None are to be found in the Constitution or statute."<sup>20</sup>

The Functional model, which is concerned with the appropriateness of judicial method to the problem raised, occasionally emerges as a subsidiary reason in a ruling decided primarily on Classical model grounds, as in *Gilligan v. Morgan*,<sup>21</sup> a case regarding the regulation of the National Guard:

It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches, directly responsible — as the Judicial Branch is not — to the elective process. Moreover, it is

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<sup>16</sup> 328 U.S. 549 (1946), at 552.

<sup>17</sup> *Supra*, note 13, at 270.

<sup>18</sup> *Davis v. Bandemer*, 478 U.S. 109 (1986), at 145.

<sup>19</sup> 307 U.S. 433 (1939).

<sup>20</sup> *Ibid.*, at 453.

<sup>21</sup> 413 U.S. 1 (1973).

difficult to conceive of an area of government activity in which the courts have less competence.<sup>22</sup>

The Classical model (*i.e.*, the existence of an express constitutional assignment to a non-judicial body) has been, by a substantial degree, the most often applied form of the political questions doctrine. The Classical model has been responsible for, among others, the rulings in *Luther v. Borden*, *Pacific States Telephone & Telegraph v. Oregon*,<sup>23</sup> *Gilligan v. Morgan*, and *Nixon v. United States*.<sup>24</sup> In fact, for all cases decided on the basis of a political question, the Classical model has been the sole or dominant consideration. Typical of this type of reasoning is that reflected in *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*,<sup>25</sup> dealing with discretionary foreign affairs decisions:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world . . . [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.<sup>26</sup>

Most recently, in *Bush v. Gore*,<sup>27</sup> the application of the political questions doctrine arose in a pointed and interesting fashion. Although there is vast scope for legal and political debate over *Bush v. Gore* and the reasonableness of the majority or minority opinions, for the present purposes the concurring opinion is of the greatest interest. In the decision by Rehnquist C.J., Scalia J. and Thomas J. concurring, those three concurring judges founded their opinion on the basis that the State Supreme Court's judgment respecting the recount removed the question of the selection of electors for president and vice-president from the legislature to a judicially directed process overseen by the State Supreme Court. In support of an order which vacated the State Court's conclusion as to how a recount was to be managed, the concurring judges stated, "This enquiry does not imply a disrespect for State *courts* but rather a respect for the constitutionally prescribed role of State *legislatures*."<sup>28</sup>

In the unusual circumstances of that case, the self-limiting doctrine was used to support a judicial order which vacated a State Supreme Court judgment

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<sup>22</sup> *Ibid.*, at 9.

<sup>23</sup> 223 U.S. 118 (1912).

<sup>24</sup> 506 U.S. 224 (1993).

<sup>25</sup> 333 U.S. 103 (1948).

<sup>26</sup> *Ibid.*, at 111.

<sup>27</sup> 148 L. Ed. 2d 388 (2000).

<sup>28</sup> *Ibid.*, at 405.



which it was concluded would have had the effect of taking away the State legislature's constitutional power to direct the selection of electors for president and vice-president.

In view of the controversy following that decision, a political questions doctrine clearly does not do away with debate and controversy. Indeed, the fact that reliance on the doctrine was had only by three members of the Court concurring in the result may indicate the lack of appeal of the approach for some, particularly on hotly debated political issues.

As already noted, what is most useful for Canadian purposes is that the American case law recognizes three principles relevant to political questions. They are:

1. The text of the constitution may expressly or implicitly require the exclusion of any judicial role in the resolution of a controversy ("Constitutional Assignment").
2. The judicial method may be inappropriate because the character of the issue is not amenable to resolution by judicially discoverable principles, or turns on the selection of a policy unsuitable for judicial decision ("Judicial Appropriateness").
3. The advisability in certain circumstances of withholding judicial remedies so as to avoid interference with the operations of the political branches of government ("Deference").

Each of these principles has found judicial support in the Canadian context, which is not surprising given the federal nature of both systems with a similar constitutional protection for individual rights. It is also not surprising that British jurisprudence has not had to struggle as much with these issues given its tradition of parliamentary sovereignty and unitary constitutional government.<sup>29</sup>

These are not isolated principles, but are by their character inter-related and may be engaged in different ways in the same case.

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<sup>29</sup> However, that is not to say prudential concerns over the scope of judicial review have not arisen in the U.K. context. See, for example, *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.) and *Council of Civil Service Unions v. Minister of Civil Service*, [1984] 3 All E.R. 935 (H.L.). For other commonwealth perspectives, see Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee and Winterton (eds.), *Australian Constitutional Perspectives* (1992).

## IV. CANADIAN JURISPRUDENCE

## 1. General

A Canadian political questions doctrine already exists, although not labelled or acknowledged as such.<sup>30</sup> The established boundaries of the Canadian principle are parallel to the classical doctrine in the United States: namely, that where the Constitution assigns the resolution of a controversy to another branch of government, judicial interference will be refused. Where, for example, constitutional amendment processes are concerned, the courts have declined to impose judicially defined standards of fairness or procedure.

On the other hand, attempts to apply the notion of the inappropriateness of judicial method or deference to other branches of government in relation to political questions have been rejected without much dissent. In *Operation Dismantle Inc. v. R.*,<sup>31</sup> where the American doctrine was expressly argued, Wilson J. declined to give it any weight where the question involved the application for an injunction to stop cruise missile testing in Canada.<sup>32</sup> However, she went on in the same judgment to recognize that an issue will be non-justiciable if it involves “moral and political considerations which it is not within the province of the courts to assess.”<sup>33</sup> In this fashion, while rejecting the American political questions doctrine *per se*, she is sometimes credited with founding the Canadian version of this doctrine in the very same judgment. A further irony is that while Wilson J. was writing a concurring judgment considering the political questions doctrine, the majority in the case dismissed *Operation Dismantle*’s claim on the basis that the allegations of breach of Charter rights could never be proven — which is to say that the evidence required to sustain the claim was inherently political and was not judicially cognizable.<sup>34</sup>

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<sup>30</sup> In *Boundaries of Judicial Review*, *supra*, note 2, at 145-200, the following settings were identified as judicially circumscribed on grounds that the matter at issue was political in nature or assigned to a political branch to adjudicate:

- (i) disputes over the legislative process;
- (ii) disputes involving constitutional conventions;
- (iii) disputes regarding parliamentary privileges and Crown prerogatives;
- (iv) disputes involving intergovernmental relations;
- (v) disputes involving social and economic rights; and
- (vi) disputes involving the enforcement of international agreements.

<sup>31</sup> *Supra*, note 4.

<sup>32</sup> *Ibid.*, at 472.

<sup>33</sup> *Ibid.*, at 465.

<sup>34</sup> *Ibid.*, at 459. The evidence in question related to the then Soviet Union’s military policy.

Despite the apparent rejection of the U.S. doctrine in *Operation Dismantle Inc. v. R.*, however, there are many cases in which the Canadian courts have acknowledged the necessity of declining to act. What is missing are clearly stated and satisfactory principles to guide the court when similar questions arise in the future.

## 2. Express Constitutional Assignment to a Non-Judicial Authority

Courts have throughout Canadian jurisprudential history been reasonably consistent in acknowledging that certain questions and processes have been constitutionally assigned for determination by other branches of government.

In cases arising out of the Meech Lake Accord, the Yukon and Northwest Territories separately challenged their exclusion from the process by which the premiers eventually agreed to submit resolutions for the amendment of the Constitution of Canada to their legislatures.<sup>35</sup> In these cases, the courts eventually held that the Territories could not complain or seek judicial remedy for being excluded from the Meech Lake bargaining table despite political promises to the contrary. Dominant in the decisions of the courts in those two cases were the considerations that the mechanism for constitutional amendment is the tabling of a resolution before the legislatures; that a resolution is not a legislative act by itself but rather part of the mechanism for constitutional change, and that the courts ought not to interfere with the political judgments which are made as to the process and substance of proposed constitutional changes.

The objection to judicial interference could not rest on the inability of the courts to apply legal standards. The Territorial governments alleged clear assurances of participation, and the allegations would certainly have been capable of being assessed as easily as any administrative law case involving a breach of the duty of fairness. It was the constitutional assignment of the process itself to the legislatures that was decisive.

In other contexts lower courts have declined to interfere with the process of constitutional amendment. In *Haig v. Canada*<sup>36</sup> the Court declined to interfere with the processes leading to, and the conduct of, the Charlottetown Accord Referendum. In *Brown v. Alberta*<sup>37</sup> the Court declined to consider a constitutional claim relating to the need for an elected senate. Similarly, the Supreme Court of Canada refused to consider a declaration concerning funding for

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<sup>35</sup> *Penikett v. R.* (1987), 45 D.L.R. (4th) 108 (Y.T.C.A.), leave to appeal to S.C.C. refused (1988), 46 D.L.R. (4th) vi (note) (S.C.C.); *Sibbeston v. Canada*, [1988] N.W.T.J. 1 (C.A.), online: QL (NWTJ).

<sup>36</sup> (1992), 9 O.R. (3d) 495 (Ont. C.A.).

<sup>37</sup> (1998), 64 Alta. L.R. (3d) 62 (Q.B.).

groups active in the process considering constitutional reform in *Native Women's Assn. of Canada v. Canada*.<sup>38</sup> This principle extends to the legislative process as well. As Sopinka J. stated in *Reference re Canada Assistance Plan (British Columbia)*, "The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle."<sup>39</sup>

In the Canadian context, therefore, the clearest examples of controversies assigned to be decided by the political branches acknowledged in the Constitution may be the consideration and passage of amendments to the Constitution and the formulation and introduction of legislation.

Another example in the post-Charter era is *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*<sup>40</sup> in 1993, in which the Supreme Court of Canada upheld the principle that the Speaker of the legislative assembly has and exercises certain privileges which have a constitutional status and are unaffected by the passage of the Charter. On the facts of that case, the Court declined to entertain a challenge based upon the freedom of expression to the Speaker's exclusive control over the media's access to debates in the legislature. In this respect the Charter effected no change since both British and Canadian precedents supported the exclusion of judicial interference in the exercise of the privileges of democratic assemblies.<sup>41</sup> McLachlin J. (as she then was), for the majority, crafted an exemption from Charter scrutiny, but not immunity from judicial scrutiny over the lawful exercise of the privileges of the House of Assembly.<sup>42</sup>

The principle of constitutional assignment as an expression of the political questions doctrine has also been extended to statutory assignment in the non-Charter jurisprudence of the Court. For example, in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*,<sup>43</sup> the Court held that a statutory provision entitling the Auditor General to report to Parliament any non-compliance with the disclosure provisions of the legislation rendered a dispute over non-disclosure non-justiciable in a court. According to the Court, dispute resolution over the matter had been assigned to Parliament. Dickson C.J. observed, "Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme."<sup>44</sup>

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<sup>38</sup> [1994] 3 S.C.R. 627.

<sup>39</sup> [1991] 2 S.C.R. 525, at 559.

<sup>40</sup> [1993] 1 S.C.R. 319.

<sup>41</sup> E.g., *Fielding v. Thomas*, [1896] A.C. 600 (P.C.), concerning the contempt jurisdiction of the New Brunswick legislative assembly.

<sup>42</sup> *Supra*, note 40, at 375.

<sup>43</sup> [1989] 2 S.C.R. 49.

<sup>44</sup> *Ibid.*, at 91.

### 3. Appropriateness or Deference

Aside from the area of express assignment to other branches of government, the Court has shown caution in declining to address an issue either because it is arguably inappropriate to judicial determination or because the Court's answer might arguably constitute interference with the operations of another part of government.

In its decisions, the Court has appeared content to address the suitability of political questions for decision by the general test of whether the controversy has a sufficient legal element. Thus in *Reference re Canada Assistance Plan (British Columbia)*<sup>45</sup> the Court addressed the terms of federal-provincial agreements on the basis that a form of contract had an adequate legal component to justify intervention by the "judicial branch" of government. This was contrasted to questions of inter-governmental negotiations or disagreements over funding levels, which would be characterized as "purely political" and, on this basis, would be non-justiciable.<sup>46</sup>

The same test was at least implicitly applied in the References concerning the patriation of the Canadian Constitution and most recently, in expressing the legal principles applicable to secession from Canada.

In *Re Resolution to Amend the Constitution*,<sup>47</sup> three provinces asked the opinions of three Courts of Appeal and, on further appeals, the Supreme Court of Canada, as to both the legality of the proposed unilateral patriation of the Constitution as well as the question of whether a unilateral patriation would violate the constitutional conventions which had allegedly developed by reason of the practices followed respecting amendments by the Imperial Parliament to the British North America Acts over the preceding century.

Only three judges would have declined to answer the question relating to constitutional conventions, despite the fact that constitutional conventions are by their character unenforceable in a court of law.

The majority justified exercising their discretion to answer the questions on the basis that the questions were constitutional in their character and amenable to resolution employing the reference procedure.<sup>48</sup> Certainly the issue of provincial participation in constitutional amendment arose out of historical facts that were not seriously disputed, even if the inferences to be drawn from those facts were hotly argued.<sup>49</sup> The political circumstances of the references also supported the court answering the questions. But for the Court's opinion, there

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<sup>45</sup> *Supra*, note 39.

<sup>46</sup> *Ibid.*

<sup>47</sup> [1981] 1 S.C.R. 753.

<sup>48</sup> *Ibid.*, at 884-86.

<sup>49</sup> *Ibid.*, at 894-95.

is little doubt that the federal government would not have sought a broader consensus among the provinces, nor would the British government have risked an international incident by second-guessing the federal government with respect to the wisdom of proceeding unilaterally. In the final analysis the Court's opinion appears to have impelled the federal-provincial settlement which ultimately led to the successful patriation of the Constitution, save for Quebec's significant refusal. In the subsequent *Quebec Veto* reference, the Court again agreed to answer the questions and confirmed the constitutional propriety of the patriation of the Constitution in the absence of Quebec's agreement.<sup>50</sup>

Almost two decades later, in *Reference re Secession of Quebec*,<sup>51</sup> the Supreme Court provided opinions on the circumstances under which Quebec would be justified in constitutional and international law in establishing itself as a separate sovereign state. Once again, the Court was satisfied that it could address the questions, as in its view they were capable of providing the legal framework for the democratic decision over secession. In its reasoning, the Court acknowledged the importance of respecting its proper role in the democratic framework of government. The Court viewed the application of these principles to be best performed by assessing whether the extralegal aspects of the controversy were severable from the legal questions before the Court.<sup>52</sup> This was certainly very different from the approach taken in the U.S. decision of *Luther v. Borden*, already referred to,<sup>53</sup> concerning the legitimacy of the Rhode Island government.

It is worth emphasizing that the Reference procedure itself reflects an important difference between the American and Canadian contexts for applying a political questions doctrine. Whereas the U.S. Supreme Court has held that providing an advisory opinion to the executive would exceed the Court's constitutionally assigned role,<sup>54</sup> the Reference jurisdiction of the Canadian Su-

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<sup>50</sup> *Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793. The Court reached this finding notwithstanding another problem of justiciability — mootness — in light of the Constitution already have been patriated at the time of the challenge. This may also be seen as a decision motivated by a political calculation, since the Court's own entanglement in legitimizing the path followed by the federal government was impugned by Quebec's challenge to the validity of patriation.

<sup>51</sup> *Supra*, note 6.

<sup>52</sup> *Ibid.*, at paras. 26-28.

<sup>53</sup> *Supra*, note 9.

<sup>54</sup> Article III of the U.S. Constitution limits federal courts to adjudicating "cases" and "controversies," which has been held to exclude advisory opinions to the executive. This is discussed in Brilmayer, "The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement" (1979), 93 Harv. L. Rev. 297.

preme Court has been upheld as constitutionally valid.<sup>55</sup> This is one of several institutional features of Canada's constitutional system that has led most observers to suggest that it is not characterized by a rigid separation of powers. However, even in the setting of References, the Canadian Supreme Court has been careful to articulate boundaries over its jurisdiction, insisting for example, that the question posed by the executive not be overly vague or hypothetical.<sup>56</sup>

While the Court has mapped out a principled framework to guide its discretion in declining jurisdiction on other grounds of justiciability,<sup>57</sup> it has resisted providing a similar framework in the context of political questions. Although the degree of "legality" may be a useful means of assessing the Court's ability to reach a reasoned conclusion, it does not address whether there are other reasons that render judicial intervention inappropriate or unwise. The Court considered whether it should exercise a residual discretion against answering the questions, but construed its jurisdiction to do so as limited to questions which are too imprecise to admit of an answer, or the Court has insufficient information to provide a reasoned answer.<sup>58</sup> The decision made implicitly in the Patriation References by the majority was that a judicial answer to questions respecting constitutional convention would assist the process by holding the federal government to the consistent practice in the past without giving the provinces each a veto over patriation. However, the consequences of the judicial conclusion were both short-term, and, by the nature of the patriation exercise, not to be repeated.

While the same concerns appear to have caused the Court to answer the reference questions in the *Secession Reference*, arguably very different circumstances were present. Although the Court appears to have gone to great pains to have provided something for both sides in the debate over the legitimacy of referenda, and to have signalled an unwillingness to judicially review the outcome of any future contest, the very circumstances of the reference suggested that further requests for judicial intervention would be inevitable in the event of

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<sup>55</sup> See *Reference re Supreme Court Act*, [1912] A.C. 571, and accompanying discussion in *Boundaries of Judicial Review*, *supra*, note 2, at 18-19.

<sup>56</sup> See *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at 485, *per* Lamer C.J. ("Where this Court is faced with a hypothetical question which cannot be answered with any assurance of correctness, the appropriate course of action is for us to decline to answer the question.")

<sup>57</sup> Consider, for example, mootness, where the Court established a three-part framework for determining whether a matter should be heard notwithstanding that it is no longer a live controversy: 1) do the parties retain an adversarial stake in the issues raised by the case? 2) in the circumstances, are the issues of sufficient importance to justify the necessary judicial resources to decide the case? and 3) would deciding the case cause the Court to depart from its traditional role in adjudicating disputes? See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 353-63.

<sup>58</sup> See *Sucession Reference*, *supra*, note 6, at para. 30.

a successful referendum campaign. Despite the Court's carefully weighed statement that the issues of what would constitute a clear question or a clear majority would not be appropriate for judicial review, the very fact of the judgment has created the expectation of future judicial review. These References illustrate that the importance of a well-articulated political questions doctrine is not simply to justify when, and why, a Court should decline to adjudicate a matter, but also when, and why, the politics surrounding certain disputes compel judicial intervention. While purporting to sever the legal from the political aspects of the *Secession Reference*, and then address only the legal, it is arguable that the Court did precisely the opposite. In either event, it is apparent that the vagueness and subjectivity of the *Secession Reference* approach to political questions provides little in the way of a principled and predictable limit to the Court's jurisdiction.

#### 4. Choice of Judicial Remedy

Although the issue of political questions is normally framed in the context of the Court's exercising its discretion not to answer a question, similar considerations may apply in the selection of judicial remedies for constitutional error. There may be circumstances where a judicial remedy may trespass upon legislative prerogatives.<sup>59</sup>

The two recent cases in which this question of a political question arose out of the choice of judicial remedy are those of *Vriend v. Alberta*,<sup>60</sup> where the Court added sexual orientation to a list of groups protected by provincial civil rights legislation, and *R. v. Sharpe*,<sup>61</sup> where the Court recently crafted two exceptions from criminality in order to provide adequate room for the exercise of freedom of speech.

As a matter of the engagement between the two branches of government, *Vriend* is perhaps the most arguable case of the Court's exercising a legislative office. The province of Alberta has no constitutional obligation to pass a human rights code, and section 15 of the *Charter of Rights and Freedoms* does not extend to private conduct.

The majority judgment treated the character of the legislature's decision in the following terms:

[T]he purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory prac-

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<sup>59</sup> See *Schachter v. Canada*, [1992] 2 S.C.R. 679. See generally Roach, *Charter Remedies* (1996).

<sup>60</sup> [1998] 1 S.C.R. 493.

<sup>61</sup> [2001] 1 S.C.R. 45.



tices. It seems to me that the remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere.<sup>62</sup>

By reading into the provincial Human Rights Code<sup>63</sup> an additional protection against discrimination on the basis of sexual orientation, the Court created a statutory right which was never debated nor passed by the legislature. In defence of the Court's choice of remedy, it could be argued that the alternative, namely, striking down the Human Rights Code, would have deprived many other people of valuable protection against violations of their human rights in Alberta. This conclusion assumes legislative inaction rather than legislative responsiveness, which may have been deterred by the Court's choice of reading-in. Perhaps the Court was of the view that the legislature had no choice but to pass a new law embracing its decision. Whatever would have occurred, there is little doubt that the Court effectively exercised a legislative power by its selection of judicial remedy.<sup>64</sup> Indeed, as noted by Major, J. in dissent, the only available evidence was that the legislature was opposed to including sexual orientation as a prohibited ground of discrimination.<sup>65</sup> On his view, that opposition meant that it was inappropriate to read in:

Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group.<sup>66</sup>

In *Sharpe*, the Court's reading-in remedy resulted in a *Criminal Code*<sup>67</sup> offence respecting child pornography which has been effectively revised by the Supreme Court of Canada. Indeed, the defendant Sharpe proceeded to trial on charges based on the revised offence. In this case, however, it can scarcely be argued that Parliament would not have returned to the business of the legislation had the Court restricted itself to striking out the unconstitutional provisions of the *Criminal Code*. Again, the Court determined that it was appropriate to

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<sup>62</sup> *Supra*, note 60, at 569.

<sup>63</sup> *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7.

<sup>64</sup> Iacobucci J. justified the Court's approach with reference to the "dialogue" theory of the judicial-legislative relationship, which had been developed earlier that year in Hogg and Bushell, "The Charter Dialogue Between the Courts and the Legislature" (1997), 35 Osgoode Hall L. J. 75. While this theory does not take the place or serve the purpose of a coherent political questions doctrine, it does reflect the perceived need on the part of the Court to account for its own role in the constitutional system, particularly with respect to the striking down or modifying of legislation.

<sup>65</sup> *Supra*, note 60, at 586.

<sup>66</sup> *Ibid.*, at 586.

<sup>67</sup> R.S.C. 1985, c. C-46.

read in, in order to render the law constitutional, by crafting two exceptions to the criminal prohibition

[I]t seems reasonable to conclude that such [the exempted] materials are caught incidentally, not deliberately, and that Parliament would have excluded these two categories from the purview of the law had it been seized of the difficulty raised by their inclusion.<sup>68</sup>

By deciding to judicially revise the provision of the *Criminal Code* in the light of the Constitution, the Court arguably both exercised a legislative power and relieved Parliament of its political obligation to ensure that there was a constitutionally valid criminal sanction relating to child pornography.

The majority judgment carefully analyzed the choices before it, including the option of declaring the law as a whole invalid. It considered the legislative history to ascertain whether its reading-in was consistent with what previously occurred. It did not expressly address whether Parliament would persist in its determination to restore the original law. In considering whether to strike down the entirety of the law, the fact that the debate when the matter returned to Parliament would be informed by the Court's reasons as well as public reaction to it does not appear to have been a factor. The dissenting judges in *Sharpe* also identified various policy rationales for the legislation which might well have also motivated legislators on reconsideration of the legislation.<sup>69</sup>

Perhaps the proper role of the Court was to identify the proper constitutional boundaries and leave it to Parliament to try again and pass a law which would not violate fundamental rights. In any event, however, consideration of the appropriateness of the reading-in remedy would benefit from a more sustained institutional analysis than that carried out to date by the Court. There is little satisfaction in conclusions about parliamentary intent since by the time of the challenge, it is a historical rather than current reality. It is precisely because the legislature's reaction to a finding of unconstitutionality is unpredictable, and subject to a dynamic political process that is itself part of constitutional government, that it is best to leave the job of creating responsive legislation to the legislative branch. Legislators need to exercise responsibly their job of upholding constitutional values, and also need to be given the opportunity to do so.

## 5. Guiding Principles

Our hope is that the Court will draw together the various strands of thought in the decisions and express principles to guide future decisions. In our view

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<sup>68</sup> *Supra*, note 61, at 115-116.

<sup>69</sup> *Ibid.*, at 162 and 170.

the categorization of issues as legal or extralegal is unhelpful and productive of obscurity rather than clarity. Similarly, labels such as “purely political” are not by themselves capable of principled application.

This analysis suggests there is a clear body of case law which declines judicial interference with processes expressly or impliedly assigned to other branches of government. We believe these precedents are for the most part well founded and ought to guide the Court in future when attempts to overlay judicial standards or oversight inevitably arise.

The difficult question of when a court should decline to act because of a concern about appropriateness has received no consistent answer in the authorities. In our view, the most important lesson from the American experience and the Canadian authorities is that a clear discussion about whether a given issue is appropriate for judicial determination is valuable and adds to the proper context and quality of a decision. There are questions which courts are simply no better situated to address than the elected branches of government, and democracy is the poorer when the principal answers provided are judicially concluded. A Canadian political questions doctrine should respond to the distinctive skills and roles of the legislative, executive and judicial branches of government and should support and not undermine the legislatures in their important and difficult work.

## V. RECENT APPROACHES TO POLITICAL QUESTIONS IN CANADA

In this section, we examine the present nature and scope of the Court’s implicit political questions doctrine through two recent cases: *United States v. Burns* and *Corbiere v. Canada*. We next turn to a brief consideration of the Court’s active avoidance of this doctrine in the setting of judicial independence and court administration.

### 1. *United States v. Burns*<sup>70</sup>

The most interesting decision of the 2001 term touching upon the Court’s approach to cases involving political questions concerns the successful challenge to the Minister of Justice’s refusal to require as a condition of the extradition of two accused murderers to the United States that the United States undertake not to seek the death penalty in the event of conviction.

This case may fit within an implied assignment model, if one was to apply the American jurisprudence which characterizes foreign policy decisions as

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<sup>70</sup> *Supra*, note 5.

inherently political in character. Certainly the Court's reasons are dominated by considerations of political trends, international relations and policy considerations bearing on the negotiation of extradition treaties.

In summarizing the sources of its conclusion with respect to the acceptability of the death penalty, the Court drew upon recent political history:

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>71</sup>

The Court also drew upon the recent discovery of several significant miscarriages of justice in concluding:

These miscarriages of justice [Guy Paul Morin, Thomas Sophonow, David Milgaard, Donald Marshall, Junior] of course represented a tiny and wholly exceptional fraction of the workload of Canadian courts in murder cases. Still, where capital punishment is sought, the state's execution of even one innocent person is one too many.<sup>72</sup>

Finally, on the international plane, the Court concluded that there was an international trend to abolition in the following terms: "[T]he trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada."<sup>73</sup>

What is the nature of the question concerning whether extradition is required to include the extraction of assurances from other sovereign states? The Court unanimously and vigorously asserted that its role in the system of justice required and justified its intervention in the Minister's exercise of discretion. It observed that the death penalty is a justice issue and the Court is the "guardian of the justice system." The previous decisions of the Court in *Reference re Ng Extradition (Canada)*<sup>74</sup> and *Kindler v. Canada (Minister of Justice)*<sup>75</sup> both expressed deference to the political character of the Minister's duties in relation to requesting assurances, but have now been replaced by the Court's determination to infer constitutional restraints in light of the change in circumstances concerning the death penalty.<sup>76</sup> In this sense *United States v. Burns* represents

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<sup>71</sup> *Ibid.*, at 329.

<sup>72</sup> *Ibid.*, at 341.

<sup>73</sup> *Ibid.*, at 335.

<sup>74</sup> [1991] 2 S.C.R. 858.

<sup>75</sup> [1991] 2 S.C.R. 779.

<sup>76</sup> This change is particularly striking in light of the Court's reaffirmation of a posture of deference to ministerial discretion in analogous circumstances in the subsequent decision of *Suresh*

greater judicial supervision in an area where a degree of deference previously existed.

The Court's approach shifted as a consequence of the revelations concerning wrongful convictions and its conclusions about the domestic and international trends away from recognizing the death penalty as a legitimate criminal sanction. Indeed, the Court concluded that it would constitute an abdication of its function if it were not to supervise this issue, as it was found to involve principles of fundamental justice.

The Court is to be applauded for extensively and unanimously setting out its reasons concerning its role in terms which address the political question arising from the facts.

If proof was needed of the observation that there are no clear boundaries in this area, *Burns* certainly provides it. Despite the Court's solid marshalling of the facts against the wisdom of employing the death penalty either here or in the United States, none of them is without answer from the pro-death penalty position. Indeed, the very DNA evidence which has provided such shocking proof of the frailty of eyewitness evidence was also instrumental in the investigation of *Burns*, and which included confessions obtained by an undercover RCMP investigation.

There are powerful justifications for abolition absent evidence of wrongful convictions, but reliance on that evidence seems embroiled in the policy debate and also begs for the right to be adjusted according to the strength of the evidence against the particular accused, which appears at odds with a conclusion founded on the death penalty being violative of principles of fundamental justice.

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*v. Canada (Minister of Citizenship and Immigration)* (2002), 90 C.R.R. (2d) 1 (S.C.C.). In *Suresh*, the Court held that the deportation of a refugee who was a suspected terrorist, notwithstanding evidence that he would face torture if returned to his country of origin, was quashed on procedural grounds. The s. 7 argument that deporting to torture would in every case shock the conscience of Canadians, however, was rejected. The irony is that in *Kindler*, the Court had stated that extradition to face the death penalty would not shock the conscience of Canadians under the s. 7 standard, but contrasted this to the hypothetical situation of a person extradited to face torture, which would in the Court's view violate s. 7 (*per* La Forest J., concurring). In *Burns*, the Court reversed course to conclude that extradition to face the death penalty would shock the conscience, while the next year in *Suresh*, the Court concluded that deporting to torture would not necessarily do so. In our view, it is only the unspoken presence of political questions considerations that reconciles these apparent contradictory pronouncements. In *Suresh*, specifically, these considerations related directly to the intervening terrorist attack on September 11, 2001, which was after the case had been argued but before the judgment was released. The judgment addresses those events directly in several passages, including where the Court, writing *per curiam*, emphasized the special justification for deference to the executive where national security issues are at stake (at paras. 31-34).

Parliament prior to this decision was not required to invest a minister with the authority to require an assurance that an extradited person not be subject to the death penalty. The existence of the statutory discretion (flowing from the treaty) to seek this assurance provided an obvious platform upon which to attach a judicial remedy; however, what is the ultimate character of the Court's remedy? The Court appeared sensitive to this and suggests that it may be unconstitutional for Canada to enter into a treaty without that protection.<sup>77</sup>

The suggestion that the Court's conclusion might embrace a constitutional restraint on the treaty-making power raises the argument that this area is constitutionally assigned to the executive and is political in its character. Although the Court stated that it was important not to give the Charter extra-territorial effect, its conclusion that the potential imposition by a foreign state of the death penalty did not give rise to a loss of mobility rights pursuant to section 6 or represent the imposition of a cruel or unusual punishment meant that it had to rely on the protections of section 7 as it relates solely to the process of extradition to anchor the constitutional right.

Although many Canadians who are fiercely against the death penalty take comfort from the fact that it is exercised by many states whose other domestic policies we disapprove of, the list also includes countries such as the United States, which we would be hard pressed to characterize as uncivilized. This being said, the Court did not consider as controlling the distinction between Canadian domestic constitutional order and the general sovereignty of states to order criminal law and sanctions within their territory.

The decision demonstrates that the Court is anxious that it be seen as legitimately exercising a judicial function. In order to found a right, however, it had to, in essence, overrule the previous decisions which had both reflected the necessity for deference to the executive in relation to extradition matters, and especially policy.

Whether requiring that the death penalty be foresworn raises any general strains in the relationship between Canada and the United States is difficult to foretell. In light of recent events, however, one can imagine difficulties if Canada refused to allow the extradition of alleged terrorists involved in mass murder within the United States.

We suspect satisfaction with the result in this case follows traditional pro- and anti-death penalty lines. Although the Court's concern over the legitimacy of its role is evident from the reasons, by determining the issue as a section 7 Charter right the collective interests and utilitarian concerns which dominate international relations often at the expense of individual rights are excluded.

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<sup>77</sup> *Supra*, note 5, at 359.

## 2. Corbiere v. Canada

The role of political questions in the determination of constitutional rights was also prominent in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.<sup>78</sup> Although the form of the constitutional question related to a section 15 challenge to provisions of the *Indian Act*,<sup>79</sup> the substance of the debate was as to the definition of the franchise for Indian band government in Canada.

The Court's conclusion appears to have been that a residential qualification for voting has become outdated by reason of the changes in demography amongst members of Indian bands. In particular, the Court rested its finding on constitutionality on the significant and growing body of persons who as a result of being non-resident members of the band were disenfranchised. The obvious inequity of non-residents being unable to vote when band government assigned housing and other on reserve benefits sharpened the injustice of the residential qualification for the franchise.<sup>80</sup>

What is unclear, however, is whether the Court would have concluded that a residential qualification could have been upheld had the demographics been different. Was the result constitutionally required upon the passage of the Charter, or was it the consequence of changed political circumstances?<sup>81</sup>

While amendments to the *Indian Act* have been very difficult to achieve, a notable change arising out of the Charter was the passage of amending legislation to ensure redress for persons who had lost Indian status by reason of discrimination based on sex. However, this process went through extensive consultation and legislative drafting such that the outcome is a complex legal structure including some band control over membership and most certainly went far beyond merely addressing the issue of sexual discrimination.

Would the obvious inequity of continuing the residential requirement not have brought about political pressure for legislative intervention? Would the legislative process have resulted in the same outcome achieved by the Court? Is the outcome achieved by the Court the best solution for Indian communities, or would a legislative process have enabled Indian communities to influence those legislative decisions in a manner which respected the different interests of on-reserve and off-reserve band members?

It appears that bands have very different demographics with respect to the portion of their community who are off-reserve members. In other contexts, the Court has been deferential to the desire of First Nations to achieve a degree of self-government in relation to band government. However, in relation to the

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<sup>78</sup> [1999] 2 S.C.R. 203.

<sup>79</sup> R.S.C. 1985, c. I-5.

<sup>80</sup> *Supra*, note 78.

<sup>81</sup> *Ibid.*, at 258-59.

very definition of the franchise for band elections, the Court refused to defer to the parliamentary process.

### 3. Judicial Independence and Court Administration

The basis for a political questions doctrine is the separation of powers. While recent discussions of the Court which refer to the separation of powers have not been limited to the setting of judicial independence and court administration,<sup>82</sup> it has been in these settings that the Court's concern for its own place in the constitutional system most explicitly informs its decision making.

Decisions regarding the salary of public servants, the funding of courthouses, and related resource issues in the administration of courts are inherently political, and in this sense no different from the funding of social welfare, education or health care. However, while courts have taken a largely deferential position to the decision making of the political branches of government in these fields, those same judges have been markedly interventionist when it comes to decisions with an impact on courts.<sup>83</sup> For example, when faced with a decision in British Columbia to close 24 courthouses, the chief provincial court judge took the extraordinary measure of sending a letter to the Attorney General, in advance of any legal challenge, to announce that "the judiciary has reached the conclusion that the government's financial decision to close courthouses is unlawful, since it was made without consultation and without due consideration of the principle of access to justice."<sup>84</sup> In Alberta, the Chief Justice of the Alberta Court of Appeal unilaterally closed one of that Court's two courthouses

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<sup>82</sup> The existence of a separation of powers in relation to the administration of criminal law was acknowledged in the mercy killing decision in *R. v. Latimer*, [2001] 1 S.C.R. 3, at 43. In the course of upholding the statutory provisions respecting homicide, the Court acknowledged and referred to the continued existence of the Royal prerogative of mercy as a matter for exercise by the executive. This is a contemporary acknowledgement of the different provinces of the executive and the judiciary in relation to the administration of the criminal law.

<sup>83</sup> See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [hereinafter *Provincial Court Judges Remuneration Reference*], and most recently *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13. For a review of this case law, see Lysyk and Sossin, "Judges" in Lysyk and Sossin (eds.), *Barristers and Solicitors in Practice* (1998), at §11.186.

<sup>84</sup> The contents of the letter from Chief Judge Ellen Baird to Attorney General Geoff Plant were reprinted in Hume, "B.C. Attorney General Ends Judicial Battle," *National Post*, April 20, 2002, at A4.



because the justices deemed it unsafe and the resources provided to address the problems insufficient.<sup>85</sup>

The Supreme Court's treatment of political decisions with an impact on courts reflects a similarly activist posture with respect to political questions which have an impact on judicial independence and court administration. In the *Provincial Court Judges Remuneration Reference*, the Court relied on section 11(d) of the Charter, sections 96-99 of the *Constitution Act, 1867*<sup>86</sup> and the unwritten guarantee of judicial independence contained in the Preamble to the *Constitution Act, 1867*, as sources for the constitutional protection of judicial independence. The content of that protection includes the protection of security of tenure, the protection of financial security and the protection of judicial administration, which extends, at a minimum, to those administrative functions central to the adjudicative process such as control over a court's docket.<sup>87</sup> Its farthest-reaching holding in that case was to remove decision making over financial benefits from the executive branch altogether and hand it instead to an independent commission.

The Court's vigilance over decision making in this area was most vividly demonstrated by its recent judgment in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*.<sup>88</sup> In those companion cases, the Supreme Court applied the framework from the *Provincial Court Judges Remuneration Reference* to a challenge by provincial court judges in New Brunswick which repealed their right to elect supernumerary status. The previous legislation establishing supernumerary status did not specify particular workload arrangements. The Court, however, accepted uncontradicted evidence showing that it was understood by everyone that a supernumerary judge received salary and benefits equal to that of a full-time judge, but only had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court.<sup>89</sup> The legislation relating to supernumerary judges was silent concerning the extent of reduction of workload, but the conditions of eligibility for the office of supernumerary judge fully reflected the conditions of eligibility for payment of a retirement pension equal to 60 percent of salary. The Court characterized the supernumerary judges' arrangement as a financial benefit which was taken away. Because that financial benefit was removed directly, and not decided by recourse to an independent body as dictated by the *Provincial Judges Remu-*

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<sup>85</sup> "Appeal Court Ends Sitting in Calgary", *The Lawyers Weekly*, Vol. 21, No. 14, August 17, 2001.

<sup>86</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>87</sup> These three aspects of judicial independence were first set out in *Valente v. R.*, [1985] 2 S.C.R. 673.

<sup>88</sup> *Supra*, note 83.

<sup>89</sup> *Ibid.*, at para. 66.

neration Reference, Gonthier J., writing for the majority, found no distinction in principle between a straight salary cut and the elimination of the offices of supernumerary judges, and consequently concluded that the law violated the constitutional principle of judicial independence.<sup>90</sup>

Writing for the dissent Binnie J., concluded that the repeal of the legislation providing for supernumerary status did not violate the requirements of judicial independence, because the benefit at issue was a discretionary one, not one mandated by the legislation or legally enforceable by supernumerary judges.<sup>91</sup> The minority concluded that the existence (or repeal) of discretionary benefits does not threaten judicial independence and that the disappointed expectations of judges, however understandable, did not justify a finding of unconstitutionality. Binnie J. reiterated that judicial independence exists as a protection for the judged, not for the judges.

The effect of cases such as *Mackin* and the *Provincial Court Judges Remuneration Reference* has been to mark off a discrete set of political decisions (*i.e.*, spending decisions with an impact on courts or judges) and to convert them into legal questions through the device of section 11 of the Charter on the one hand, and the Judicature and Preamble provisions of the *Constitution Act, 1867*, on the other. While the legal basis for this intervention in the political sphere would appear to exist even if there were no Charter guarantees, it is not coincidental that the jurisprudence on judicial independence, beginning with *Valente*, appears after the enactment of the Charter, and the deeper entanglement of courts in the policy-making process.

As alluded to above, another significant consequence of this political entanglement, which is particularly apparent in the sphere of judicial independence, is the new emphasis on Canada's separation of powers doctrine. While the Court has long recognized that the judiciary, executive and legislative branches of government have separate roles,<sup>92</sup> only after the enactment of the Charter has the Court wrestled with the implications of this doctrine for Canada's constitutional system. To the extent that this doctrine has found recognition by the Court (indeed, Lamer C.J. referred to the separation of powers as the "back-

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<sup>90</sup> It should be noted that this decision occurred three years after the law at issue was enacted. Thus, to the extent that this framework is an aspect of the constitutional guarantee of judicial independence, it could not have been one known to the New Brunswick legislature at the time the law was drafted.

<sup>91</sup> *Mackin*, *supra*, note 83, at paras. 141-49.

<sup>92</sup> See, for example, *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455, at 469-70.

bone” of Canada’s constitutional system),<sup>93</sup> it has been by judicial fiat — as Peter Hogg, among others, has noted, the Constitution itself does not indicate that each branch of government exercise only “its own” function.<sup>94</sup>

The Court revisited the separation of powers, and its own role in delineating the boundaries of this doctrine, in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*.<sup>95</sup> In *Ocean Port*, the Court ruled that administrative tribunals, as elements of the executive branch of government, do not enjoy the constitutional requirement of institutional independence as courts do. The fact that many tribunals perform the same adjudicative tasks as courts, or that the consequences of their decisions for affected parties may be equally as significant as courts, was not the issue in the Court’s eyes. Rather, as McLachlin C.J. made clear, writing for the Court, the executive “spans the constitutional divide” between the courts and the legislature.<sup>96</sup> The Court characterized the status of tribunals (even adjudicative ones) as first and foremost a form of “policy making,” while courts alone possess the “inherent jurisdiction” over resolving disputes in an impartial and independent forum.<sup>97</sup>

This discussion of the Court’s decision making on its own place in the separation of powers shows how the Court’s unique role as interpreter of Canada’s constitutional system shelters prudential and often strategic political decision-making behind a veneer of legal reasoning. The Court’s reasoning, moreover, because it is “legal,” is without accountability. Whereas it is open to a government to enact laws notwithstanding portions of the Charter if there are compelling political reasons for doing so, the unwritten principles relied on by the Court in elaborating its own, exclusive sphere of decision making in relation to judicial independence and court administration cannot be modified, challenged or trumped by the political branches. While the courts and legislatures may engage in a dialogue on Charter rights, when it comes to the application of a political questions doctrine, the Court always has the last word. This is why, in our view, the Court owes a duty of public trust to be both transparent and coherent when it comes to justifying this decision making. As we have attempted to demonstrate in the analysis above, this is a duty which the Court has yet to satisfactorily discharge.

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<sup>93</sup> See *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at 867 (Lamer C.J. was concurring in this case, but adopted this portion of his reasons when writing for the majority in the *Provincial Court Judges Remuneration Reference*, *supra*, note 81, at 90.)

<sup>94</sup> Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 7-24.

<sup>95</sup> 2001 SCC 52. This case is discussed by The Hon. R. Sharpe in this volume.

<sup>96</sup> *Ibid.*, at para. 24.

<sup>97</sup> *Supra*, note 95.

## VI. THE FUTURE

Cases raising the nature and scope of Canada's political questions doctrine will continue to arise. Hopefully they will not concern the legitimacy of a national election as occurred in *Bush v. Gore*,<sup>98</sup> or the actual results of a secession referendum as contemplated by the *Secession Reference*.<sup>99</sup>

It is likely that the two areas of continued activity will be friction between the different branches of government and the development of new constitutional rights under the Charter. As to the former, it is hoped that the Court in future will expressly address whether the judicial method is either appropriate or more skilled in determining the substantive issue than the executive or the legislature. As to the latter, we hope that the Court will expressly address the determination of constitutional remedy and the boundaries of constitutional rights in a way that permits the democratic process to remain engaged in social issues that are not amenable to questions of proof or legal reasoning.

In the Court's current term, however, it must address the issue of the potential collision between Charter values and school board democracy in *Chamberlain v. Surrey School District No. 36*.<sup>100</sup> Similarly, the question of whether the federal law of marriage is unconstitutional on the basis that it discriminates on the basis of sexual orientation is being litigated in three provinces and has led the first judge to express discomfort in judicially determining the appropriate definition for this unit of society in light of the cultural, moral, religious and historical dimensions of the question.<sup>101</sup> Finally, the Court returns to the question of judicial independence in *Ell v. Alberta*,<sup>102</sup> which examines whether the reach of the doctrine extends to justices of the peace, and to the implications of *Ocean Port*,<sup>103</sup> which it will explore in *C.U.P.E. v. Ontario (Ministry of Labour)*.<sup>104</sup> There will undoubtedly be more opportunities for the Supreme Court to establish guiding principles for itself and all Canadians.

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<sup>98</sup> *Supra*, note 27.

<sup>99</sup> *Supra*, note 6.

<sup>100</sup> Unreported, October 4, 2001, Doc. 28654 (S.C.C.).

<sup>101</sup> *Egale v. A.G. Canada* [2001] B.C.S.C. 1365.

<sup>102</sup> [2000] A.J. No. 1101 (C.A.), online: QL (AJ), leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 587, online: QL (SCCA).

<sup>103</sup> *Supra*, note 95.

<sup>104</sup> [2000] O.J. No. 4361 (C.A.), online: QL (OJ), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 33, online: QL (SCCA).

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