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Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence under the *Oakes* Test

Robert E. Charney and S. Zachary Green*

But Scientists, who ought to know,
Assure us that it must be so ...
Oh! let us never, never doubt
What nobody is sure about!
Hilaire Belloc

Courts often have to make predictions on the basis of expert evidence. In tort cases courts rely on expert evidence to predict future economic loss, life expectancy and future care costs.¹ In criminal cases, and particularly in dangerous offender applications, courts must consider expert predictions on the risk that the offender will re-offend.² Courts recognize that such questions are “fraught with difficulty, for it is in large measure pure speculation”.³ Future events cannot be “proved” or “disproved” in the conventional sense that facts relating to past events can be.

Accordingly, courts do not require that a plaintiff who seeks compensation for future pecuniary loss satisfy the traditional “balance of probabilities” standard. If the plaintiff establishes “a real and substantial risk” of future pecuniary loss, she is entitled to compensation. The amount of compensation will in turn depend on the

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¹ John M. McLeish, “Contingencies; Loss of Interpersonal Relationships; The Material Contribution Test; and Punitive, Exemplary, and Aggravated Damages” in Law Society of Upper Canada, *Special Lectures 2005: The Modern Law of Damages* (Toronto: Irwin Law, 2005), at 279.

² *Criminal Code*, R.S.C. 1985, c. C-46, s. 753.

³ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229, at 249.

degree of risk established and the contingencies that might affect future earnings.⁴

Similarly, expert evidence in Charter cases, and particularly evidence proffered in relation to Charter section 1, often involves prediction and speculation about the potential impact of a statute or government policy on future events. Experts in economics, sociology, political science, psychology and other disciplines where academics purport to have forensic expertise often provide the courts with competing opinion evidence in relation to the various elements of the *Oakes*⁵ test.

A review of the courts' decisions in relation to Charter section 1 over the past 20 years reveals a number of examples where the courts have had to weigh conflicting expert predictions in various disciplines.⁶ What would be the impact on sexual violence and other crimes against women and children if there were no laws regulating pornography?⁷ What would be the effect on our pluralist society if all private religious schools received full funding?⁸ What would be the economic consequences of increasing welfare rates,⁹ or abolishing mandatory retirement?¹⁰ Do health warnings on cigarette packages really discourage smoking?¹¹ And, most recently, will permitting private health insurance increase or decrease (or have no effect on) the availability of publicly funded health care resources?¹² All of these are questions on

⁴ *Graham v. Rourke*, [1990] O.J. No. 2314, 74 D.L.R. (4th) 1, at 12-15 (C.A.).

⁵ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].

⁶ While the legal burden shifts in the course of the Charter analysis from the claimant (who must prove the infringement) to the government (which must prove that the infringement is justified), the reality is that in many cases — particularly those involving discrimination or fundamental justice — both parties adduce expert opinion evidence not just for the purpose of demonstrating (or refuting) the Charter s. 1 justification, but also for the purpose of demonstrating (or refuting) the Charter right infringement itself. It is not always easy to tell where proving an infringement ends and where justification begins; consider for example expert evidence adduced in respect of the "correspondence" factor of the *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 equality analysis.

⁷ *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 [hereinafter "*Butler*"].

⁸ *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 [hereinafter "*Adler*"].

⁹ *Masse v. Ontario*, [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Div. Ct.).

¹⁰ *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 [hereinafter "*McKinney*"].

¹¹ *RJR-MacDonald v. Canada*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 [hereinafter "*RJR-MacDonald*"].

¹² *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "*Chaoulli*"].

which the courts have received expert evidence under Charter section 1 in order to determine whether an impugned law really furthered an important government objective or was rationally related to that objective.

In the first 10 years after *Oakes*, the Supreme Court articulated a limited view of its role in choosing between conflicting expert evidence in disciplines such as economics. In our view, this course of restraint in the face of empirical uncertainty was wise. Even with the best evidence available, the economic and social consequences of many government policy decisions are not capable of prediction to any degree of certainty approaching probability. Take, for example, the potential impact of fully funding all private religious schools in Ontario's pluralist society. In *Adler*, some experts predicted that such funding would lead to the gradual demise of the public school system and increased ethnic and religious segregation and intolerance that would result in the progressive Balkanization of society. Other experts predicted that full funding of private religious schools would promote the Canadian values of multiculturalism and religious freedom, and lead to greater understanding and respect for religious minorities, thereby strengthening pluralism and democracy. Each side pointed to other jurisdictions to support their opinion. The reality, however, is that such predictions cannot be proven in court; the only way to actually determine the impact of fully funding all private religious schools in Ontario would be to fully fund all private religious schools in Ontario, wait 30 or 40 years, and do a retrospective study. But public policy is made prospectively, not retrospectively, and in such matters educated guess-work is inevitable.

Courts have no greater expertise than legislatures in choosing between competing economic or social scientific predictions, and where there is no demonstrably right answer to a policy question, judicial deference to the legislature is appropriate. In fact, a legislature is in a better position than a court to choose between competing economic or social scientific theories and the predictions that they generate. The litigation process is well designed to find adjudicative facts, but not so well designed to find legislative facts: that is, judicial fact-finding is tailored towards coming to conclusions about discrete past events from *viva voce* evidence, but is less suited to describing ongoing relationships and continuing policies — and less suited still to calculating the probable effect of hypothetical future policies — on the basis of statistical or economic evidence.

Courts assessing the continuing operation or future application of a government policy are inevitably asked to choose between two (or more) expert evidence reports. On what principled basis do courts prefer the predictions of one properly qualified expert to another? The principal mechanism for quality control in academic science is peer review, through which the theses of individuals are critically scrutinized for their credibility, cogency and significance by the community of experts.¹³ The judicial model of fact-finding, by contrast, is premised on a single authoritative fact-finder, whose informational inputs are the sworn assertions of particular experts chosen for their conformity to the pre-existing litigation position of the parties, and whatever concessions can be obtained from these experts on cross-examination by non-expert lawyers. As Manfredi and Maioni note:

Adversarial fact-finding complicates matters further at the trial court level by presenting information in a manner that detracts from its comprehensiveness, quality, and integrity; that promotes unrealistic simplification; and that hinders the “logical order needed for a systematic consideration of findings on a specific topic”. At the appellate level, the adversarial nature of adjudication tends to exaggerate the authoritativeness of information and to encourage courts to treat hypotheses as axioms.¹⁴

Judicial fact-finding is deficient in this respect when compared with governmental fact-finding, which may allow for more systematic assessment of polycentric issues through statistical and economic evidence, stakeholder input, and long-term financial and demographic planning. By contrast, judicial assessment of policy issues tends to suffer from what Greschner and Lewis call “telescopic vision”: litigation is focused on a single aspect of a particular statute or government program, with the effect that the single issue being litigated is magnified in importance, and all other considerations, competing interests, and claims for resources lose their focus.¹⁵ The institutional limitations of the judicial process mean that courts are focused on a

¹³ J. Ziman, *Real Science: What It Is, and What It Means* (Cambridge: Cambridge University Press, 2000), at 42-43.

¹⁴ C. Manfredi & A. Maioni, “Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada” (2002) 27 *J. Health. Pol.* 213, at 218-19 (citations omitted).

¹⁵ D. Greschner & S. Lewis, “Auton and Evidence-Based Decision-Making: Medicare in the Courts” (2003) 82 *Can. Bar Rev.* 501, at 507-508.

particular issue in isolation, and have only the evidence presented by the particular parties before them. In contrast, legislatures must consider each issue within a broader context and with the benefit of a greater number of sources of information.

A number of cases in the 20 years since *Oakes* illustrate the Supreme Court's recognition that it cannot finally resolve ongoing economic or social science debates through the judicial process, or make judicial "findings" about the potential outcomes of future legislative policy changes.

I. THE LABOUR TRILOGY

In 1987 the Supreme Court was confronted with the issue of whether freedom of association in Charter section 2(d) guaranteed a right to strike and a right to bargain collectively. In what has become known as the "Labour Trilogy", the majority of the Supreme Court held that freedom of association did not guarantee either of those rights. What is significant is how the potential application of Charter section 1 to future cases influenced the Court's interpretation of the rights at issue. The Court recognized that if the rights to strike and bargain collectively were guaranteed, the Court would then have the responsibility to reconsider all of the legislative decisions that limited those proposed rights, even though there "are no clearly correct answers to these questions":

The Court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the *PSAC* case, the Court must decide whether mere postponement of collective bargaining is a reasonable limit, given the Government's substantial interest in reducing inflation and the growth in government expenses. In the *Dairy Workers* case, the Court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature. However, if the right to strike is found in the *Charter*, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by

the parties, despite the social implications of each decision. This is a legislative function into which the courts should not intrude.¹⁶

The *Dairy Workers* case is a case in point.¹⁷ The case concerned Saskatchewan legislation that prohibited strikes and lockouts in the dairy industry. Had the majority concluded that there was a right to strike under Charter section 2(d), they would have been required to decide “whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts”.¹⁸ As in many of the early Charter cases where the case arose prior to the Supreme Court’s 1986 decision in *Oakes*, the evidence adduced at the hearing in 1984 was very limited, and appears to have consisted mainly of newspaper articles that both sides consented to admit.

The majority’s concerns, however, would remain equally valid in the face of conflicting economic expert opinions that each side could, no doubt, have obtained. Whether any particular strike will, in the short or long run, be good or bad for a particular sector of the economy depends on a number of variables and future contingencies that necessarily transforms every expert opinion into speculation and prediction. That economic speculation and prediction will be based as much, and sometimes more, on economic theory and personal values as it is on facts or statistics. If one expert were to predict serious adverse consequences for the dairy industry, and a different expert were to predict that such consequences can be avoided (or that the strike will actually benefit the dairy industry in the long run), how could the Court choose between such predictions? The answer is that the Court *should not choose* between competing economic predictions, but should defer to the choice made by the legislature as long as credible expert evidence is tendered in support of that position. If economic predictions are to be made, the Court can ask no more than that the legislature establish “a real and substantial risk” that certain adverse consequences will occur.

While the majority found it unnecessary to consider Charter section 1, Dickson C.J.’s concurring opinion (he found an infringement of Charter section 2(d)) is consistent with this approach. On the basis of

¹⁶ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 419-20.

¹⁷ *R.W.D.S.U. v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 [hereinafter “*Dairy Workers*”].

¹⁸ *Id.*

the information contained in the newspaper articles appended to the union's affidavits, Dickson C.J. found that the "economic harm threatened by a total work stoppage in the dairy processing industry" justified the imposition of compulsory arbitration in the place of a right to strike notwithstanding the competing evidence/predictions filed by union officials.¹⁹

Similarly, in the companion *PSAC* case,²⁰ Dickson C.J., in a partially concurring opinion, was prepared to accept the expert opinion of "three of the four economists at trial" who agreed that inflation was a serious problem in 1982. More problematic was whether the imposition of compensation controls on a relatively small (5 per cent) proportion of the labour force was an "effective strategy for fighting inflation". Again, Dickson C.J. counselled judicial caution in matters of economic policy:

In my opinion, courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations. It would be highly undesirable for the courts to attempt to pronounce on the relative importance of various suggested causes of inflation, such as the expansion of the money supply, fiscal deficits, foreign inflation, or the built-in inflationary expectations of individual economic actors. A high degree of deference ought properly to be accorded to the government's choice of strategy in combating this complex problem.²¹

II. IRWIN TOY

Similar cautions have been expressed in other cases where competing economic or social science evidence was tendered in court in relation to Charter section 1. For example, in *Irwin Toy* the Supreme Court was confronted with competing evidence regarding the susceptibility of young children to media manipulation and their ability to differentiate between reality and fiction.²² While the evidence was consistent with

¹⁹ *Dairy Workers*, *supra*, note 17, at 463 *per* Dickson C.J.

²⁰ *P.S.A.C. v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 [hereinafter "*PSAC*"].

²¹ *PSAC*, *id.*, at 442.

²² *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 [hereinafter "*Irwin Toy*"].

regard to young children, the opinion evidence was more divided when children aged 6-13 were involved. Again, the Supreme Court confirmed that “courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise time”.²³ It is the legislature, not the court, which should weigh and assess conflicting scientific evidence:

The same can be said of evaluating competing credible scientific evidence and choosing thirteen, as opposed to ten or seven, as the upper age limit for the protected group here in issue. Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.²⁴

This caution regarding conflicting scientific evidence was also raised in the context of the “minimal impairment” step of the *Oakes* test:

Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. ...

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources.²⁵

Finally, the Supreme Court confirmed that the issue for a court which is called upon to assess “competing social science evidence” is not to decide which social scientist is right, but to decide whether the

²³ *Id.*, at 889, citing *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 781-82.

²⁴ *Id.*, at 889-90.

²⁵ *Id.*, at 993.

legislature had, on the evidence tendered, a “reasonable basis”²⁶ to make the policy choice it made:

In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children’s advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government’s pressing and substantial objective.²⁷

An important issue in *Irwin Toy* was whether the government’s Charter section 1 case must be limited to the evidence that was before the legislature when it passed the legislation, or whether the Court should consider expert evidence and studies post-dating the enactment of the challenged legislation. The reality of today’s political world is that legislation is often passed without the benefit of a thorough scientific or expert analysis. Politicians often proceed on the basis of limited empirical evidence or even (what is to them) experience and common sense. Indeed, politicians are often criticized when the resolution of a pressing policy issue is delayed to permit more study or review. The Supreme Court in *Irwin Toy* concluded that the government’s case is not restricted to evidence contemporary with the adoption of the legislation, and that “the government surely can and should draw upon the best evidence currently available”.²⁸ To proceed otherwise would turn the Charter analysis from a review of legislation to an inquiry into what the legislators themselves knew or understood when the legislation was passed.

III. MCKINNEY

McKinney dealt with the constitutional validity of the definition of “age” in the Ontario *Human Rights Code*²⁹ that permitted mandatory retirement provisions in contracts of employment.³⁰ Numerous experts in economics, industrial relations, social science and demographics

²⁶ The Court also refers to this as a “sound evidentiary basis” for the government’s conclusions. See *Irwin Toy*, *supra*, note 22, at 999.

²⁷ *Id.*, at 994.

²⁸ *Id.*, at 984.

²⁹ R.S.O. 1990, c. H.19, s. 10.

³⁰ *Supra*, note 10.

provided conflicting predictions on the potential impact of prohibiting mandatory retirement on industrial relations, hiring, training, dismissal, monitoring and evaluation, pensions, compensation, and youth employment. Once again the majority of the Court recognized that judges were not in a position to decide which set of expert predictions was correct:

In undertaking this task, it is important again to remember that the ramifications of mandatory retirement on the organization of the workplace and its impact on society generally are not matters capable of precise measurement, and the effect of its removal by judicial fiat is even less certain. Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as *Irwin Toy, supra*, at p. 993-94, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.³¹

The Supreme Court reiterated that the “operative question in these cases is whether the government had a reasonable basis, on the evidence tendered”, for its policy decision. Given the competing and conflicting economic predictions, it was reasonable for the legislature to opt for “a cautious approach to the matter”:

The Legislature, like the Court, was faced with competing socio-economic theories, about which respected academics not unnaturally differ. In my view, the Legislature is entitled to choose between them and surely to proceed cautiously in effecting change on such important issues of social and economic concern. On issues of this kind, where there is competing social science evidence, I have already discussed what *Irwin Toy, supra*, has told us about the stance the Court should take. In a word, the question for this Court is whether the government had a reasonable basis for concluding that the legislation impaired the

³¹ *McKinney, supra*, note 10, at 304-305.

relevant right as little as possible given the government's pressing and substantial objectives.³²

IV. BUTLER

In *Butler*, the Charter section 1 analysis focused on the evidence that justified the prohibition on the distribution of obscene materials.³³ Did the evidence “prove” that exposure to obscene materials resulted in “antisocial attitudinal changes” and make “degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable”?³⁴ The Supreme Court acknowledged that the social science literature on the causal relationship between pornography and the risk of harm to society “remains subject to controversy”.³⁵ The Supreme Court reviewed the numerous published reports with inconsistent conclusions, and held that “a direct link between obscenity and harm to society may be difficult, if not impossible, to establish”. In the face of inconclusive social science evidence, the Supreme Court adopted the *Irwin Toy* standard of whether Parliament had a “reasonable basis” for its policy choice.³⁶ In this context a “reasoned apprehension of harm” was sufficient to meet the *Oakes* test.

V. RJR-MACDONALD

The most extensive discussion of the issue of the role of the Court when confronted with conflicting social science evidence is found in *RJR-MacDonald*, where the Supreme Court had to analyze the conflicting social science evidence relating to tobacco advertising and unattributed health warnings on tobacco products.³⁷

Justice McLachlin (as she then was) and La Forest J. agreed that an “overtechnical” approach to section 1 was to be avoided, and that the “proof to the standards required by science” was not required.³⁸

³² *Id.*, at 309.

³³ *Supra*, note 7.

³⁴ *Id.*, at 491-94.

³⁵ *Id.*, at 501.

³⁶ *Id.*, at 502.

³⁷ *Supra*, note 11.

³⁸ *RJR-MacDonald*, *supra*, note 11, at paras. 126-127.

To La Forest J., the scientific uncertainty regarding the causal connection between advertising and tobacco consumption and addiction did not preclude the government from prohibiting such advertising even if it limited freedom of expression. He described the causal connections as one of “the mysteries of human psychology. Many of the workings of the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time”.³⁹ In the face of a gap in scientific knowledge of the causes of tobacco consumption, a strict application of the *Oakes* analysis would:

place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere...To require Parliament to wait for definitive social science conclusions every time it wishes to make social policy would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which, in my view, is simply not consonant with reality.⁴⁰

If courts insist on “proof to the standards required by science”, legislatures will simply be unable to make any policy decision in areas where such decisions are based on forecasting the future or on imperfect scientific knowledge. And the reality is that all policy decisions with any relationship to economics involve some degree of forecasting.

Justice La Forest adopted the following observations from LeBel J.A., who was then on the Quebec Court of Appeal:

Interpreted literally, mechanically, without nuance, the *Oakes* test and the burden of proof which it imposes on the state would most often negate its ability to legislate.

Moreover, such an approach misconceives the nature of a constitutional case such as this. It cannot be dealt with as if it were an ordinary civil trial. We are not dealing with a matter in which, for example, a particular litigant seeks to demonstrate that his tobacco consumption and the advertising of a manufacturer whose cigarettes he consumed caused his lung cancer or his emphysema. It is rather a question of determining the basis on which a legislator may choose to act, where the outcome is uncertain.

³⁹ *Id.*, at para. 66.

⁴⁰ *Id.*, at para. 67.

It is necessary to understand the limits and the nature of policy choices. It is often difficult to forecast the future and to anticipate the beneficial or negative consequences of government policy. A well-conceived policy may be poorly applied. The necessary institutional resources may fail; unforeseen obstacles may intervene. If one is to apply rigorously the criterion of civil proof on the balance of probabilities it will be impossible to govern. On this basis, it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive.⁴¹

Accordingly, in the face of conflicting complex social science evidence, La Forest J. was of the view that a “high degree of judicial deference” was appropriate, and the Attorney General of Canada “need only demonstrate that Parliament had a rational basis for introducing the measures contained in the Act”.⁴²

Justice McLachlin agreed that courts must remain “sensitive to the social and political context of the impugned law and allow for difficulties of proof inherent in that context”, but she emphasized that there was a “bottom line” that courts must maintain to ensure that “before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relationship to the seriousness of the infringement”.⁴³ While she agreed with La Forest J. that “proof to the standard required by science is not required” she insisted on maintaining “the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis”. Justice McLachlin was careful to explain however, that “discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view”.⁴⁴ Thus, in the case of legislation aimed at reducing tobacco consumption, where the legislation “is directed at changing human behaviour...the causal relationship may not be scientifically measurable”, and the Court may find a causal connection “on the basis of reason or logic”.⁴⁵

⁴¹ *Id.*, at para. 67.

⁴² *Id.*, at para. 77.

⁴³ *Id.*, at para. 129.

⁴⁴ *Id.*, at para. 137.

⁴⁵ *Id.*, at para. 154.

While McLachlin J. was prepared to find a causal connection between certain forms of advertising, package warnings and consumption on the basis of reason, she was not able to see the connection “based on logic or reason” between the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products and tobacco consumption.

Another issue that both La Forest J. and McLachlin J. commented upon was the question of appellate court deference to the fact finding of the trial judges. As a general proposition, it is a well established principle that an appellate court may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where the error influenced the trial judge’s final conclusion or overall appreciation of the evidence.⁴⁶ Both La Forest J. and McLachlin J. (in a decision which foreshadows her later decision in the *Chaoulli* case) agreed that this principle applies to adjudicative facts, but will not apply with equal force to factual findings related to broad socio-economic facts and predictions upon which legislative policy decisions are usually made. Justice La Forest explained that:

The privileged position of the trial judge does not extend to the assessment of “social” or “legislative” facts that arise in the law making process and require the legislature or a court to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour... conclusions of this nature are most accurately characterized as social or legislative facts because they involve predictions about the social effects of legal rules, which are invariably subject to dispute.⁴⁷

With regard to the alleged causal connection between tobacco advertising and consumption, La Forest J. held that appellate court judges are as well placed as trial judges to make such findings. Indeed, if appellate courts were bound by trial court rulings regarding legislative facts, legislation that was valid in one province could be invalid in another province because of the trial judges’ disagreement regarding socio-economic facts and predictions, and trial judges could ignore Supreme Court precedent simply by making different factual

⁴⁶ *Dorval v. Bouvier*, [1968] S.C.R. 288; *Lapointe v. Hospital Le Gardeur*, [1992] S.C.J. No. 11, [1992] 1 S.C.R. 351, at 358.

⁴⁷ *RJR-MacDonald*, *supra*, note 11, at para. 79.

conclusions regarding the conflicting social-science evidence presented in the case before them.

It is also clear from the balance of La Forest J.'s Charter section 1 analysis that even if the traditional principle of appellate court deference to the trial judge's factual findings did apply, he would have found that the trial judge had "disregarded a substantial amount of evidence that might otherwise have substantiated the government's belief in a rational connection",⁴⁸ and had also asked himself the wrong question. The role of the trial judge was not to decide between two bodies of expert opinion on the connection between advertising and consumption, but whether the legislature had a reasonable basis for concluding that such a connection existed.

Justice McLachlin shared La Forest J.'s general approach to this issue of deference to the trial judge's finding, but recognized that the distinction between legislative and adjudicative facts may be hard to maintain in practice. Her conclusion on this point was:

Suffice it to say that in the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy oriented evidence. As a general matter, appellate courts are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation, since the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. At the same time, while appellate courts are not bound by the trial judge's findings in respect of social science evidence, they should remain sensitive to the fact that the trial judge has had the advantage of hearing competing expert testimony firsthand. The trial judge's findings with respect to the credibility of certain witnesses may be useful when the appeal court reviews the record.⁴⁹

VI. CHAULLI

We have seen that, in the first decade of reviewing expert evidence under Charter section 1, the Supreme Court articulated the deferential

⁴⁸ *Id.*, at paras. 87-92.

⁴⁹ *Id.*, at para. 141.

principle that the legislature is entitled to choose from among competing expert opinions or predictions, even in the absence of demonstrable proof that its choice is the “right” one. In the main, the Supreme Court continued to apply this deferential principle throughout the second decade of Charter section 1 review, finding that Parliament was entitled, in the face of conflicting and inconclusive social science evidence, to prohibit the possession of child pornography⁵⁰ and marijuana,⁵¹ and to place strict limits on the spending abilities of third parties during election periods,⁵² on the basis of a reasoned apprehension of harm.⁵³

Hogg has identified empirical or scientific uncertainty as one of a number of factors considered by the Supreme Court to warrant deference to the legislature:

Among the considerations that are invoked by the Court in support of a degree of deference to the legislative choice are: where the law is designed to protect a vulnerable group (children, for example), where the law is premised on complex social-science evidence (about the effect of advertising, for example), where the law reconciles the interests of competing groups (mandatory retirement, for example) and where the law allocates scarce resources.⁵⁴

Having regard to Hogg’s list of considerations in support of judicial deference, a legal prognosticator (never more accurate than a social scientist or economist) would likely have predicted that *Chaoulli v. Quebec* constituted a perfect case for the Court to take a restrained approach to the expert evidence.⁵⁵ *Chaoulli* concerned a challenge to provisions of Quebec’s health insurance statutes that prohibited the making of private contracts of insurance to cover the cost of services

⁵⁰ *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45.

⁵¹ *R. v. Malm-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571; *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735.

⁵² *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827.

⁵³ This is not to say that the government was always successful in those cases in which conflicting social science evidence was central. In *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, the Supreme Court accepted the pressing objectives advanced by the government, but did not uphold the impugned legislation under the minimal impairment analysis.

⁵⁴ P.W. Hogg, *Constitutional Law of Canada*, 2006 looseleaf ed. (Scarborough, Ont.: Carswell, 1997), at 35-38 to 35-39 [footnote omitted].

⁵⁵ *Supra*, note 12.

paid for under the provincial plan.⁵⁶ The purpose of this prohibition, as determined by the trial judge and accepted by a majority of the judges of the Supreme Court,⁵⁷ was to prevent the establishment of a parallel private health insurance system that would compete with the public system for the finite health care resources that existed in the province. The claimants contended that the prohibition went beyond what was necessary to ensure the integrity of the public health insurance plan.⁵⁸

It is obvious that questions of the institutional design of a provincial health insurance plan involve all four of the considerations in favour of judicial deference identified by Hogg, just as it is obvious that such questions are deeply and essentially politically contested. As is the case with many policy questions, while there is no shortage of expert opinions based on competing economic theories, there is little consensus and no demonstrably correct answer. The claimants in *Chaoulli* relied on categorical expert opinion to the effect that the efficient provision of health care in Quebec “will only be reached after the government decides to introduce a health care system based on [private] contracting or reimbursement”, while the government’s expert opined in similarly unequivocal terms that “allowing private insurance to be available as an alternative to Medicare would have profound negative impacts on the public system rather than none as is assumed. It would not increase availability of services in the public sector or reduce waiting lists. Instead, it would divert resources from the publicly financed program to be available to private activities and it would increase total Canadian expenditures on health.”⁵⁹ Both sides pointed to the experience in other jurisdictions as conclusive proof of the validity of their own contentions.

⁵⁶ Five other provinces have similar statutory bars to private health insurance, including Ontario (see *Health Insurance Act*, R.S.O. 1990, c. H.6, s. 14).

⁵⁷ See *Chaoulli v. Quebec (Attorney General)*, [2000] J.Q. no 479, at paras. 258-259 (S.C.) per Piché J., adopted by Binnie and LeBel JJ., at para. 241 and Deschamps J., at paras. 23 and 54-55.

⁵⁸ The claimants relied on *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 792 for the proposition that Charter s. 7 is infringed where “legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective”. The unfortunate effect of the *Heywood* overbreadth doctrine is correctly identified by Hogg: “a judge who disapproves of a law will always be able to find that it is overbroad.” P.W. Hogg, *Constitutional Law of Canada*, 2006 looseleaf ed. (Scarborough, Ont.: Carswell, 1997), at 44-45.

⁵⁹ See the expert evidence reviewed in *Chaoulli v. Quebec (Attorney General)*, [2000] J.Q. no 479, at paras. 117-19 and 102-15 (S.C.).

At the Supreme Court, all seven judges concluded that, at least in some circumstances, the statutory prohibition against buying private health insurance compromised the personal security of Quebec residents. The Court divided over whether the impugned provisions were justified by the need to preserve the public health insurance plan. Three judges (McLachlin C.J. and Major J., writing for themselves and Bastarache J.) held that the prohibition against contracting for private health insurance infringed Charter section 7 as well as section 1 of the *Quebec Charter of Human Rights and Freedoms*, and that neither infringement was justified. Three judges (Binnie and LeBel JJ., writing for themselves and for Fish J.), found no infringement of Charter section 7, because the prohibition was “directly related to Quebec’s interest in promoting a need-based system and in ensuring its viability and efficiency”,⁶⁰ and found that the infringement of the Quebec Charter section 1 was justified. The seventh judge, Deschamps J., found an unjustified infringement of the Quebec Charter but did not consider the Canadian Charter. In the result, the impugned provisions were declared to be inconsistent with the Quebec Charter as an unjustified infringement of the right to personal security.

Justice Deschamps was the only judge that dealt in detail with the issue of due deference,⁶¹ and she was clearly of the view that this was not an appropriate case to show deference to the legislature’s choice. Indeed, her reasons evince a certain impatience with the protracted debate among policy-makers, elected legislators and the public regarding the merits and efficacy of single-payer public health insurance: she noted what she viewed as “the tendency to focus the debate on a sociopolitical philosophy” rather than on “the urgency of taking concrete action”, and held that the government’s inertia or “failure to act” could not be used to justify judicial deference.⁶²

Inverting the earlier authority that elected legislators, not courts, are best positioned to assess complex social scientific evidence and to come to a reasoned apprehension of the harm that legislation is intended to address, Deschamps J. instead praised the superiority of courts in coming to conclusions about the efficacy of public health care. Courts

⁶⁰ *Id.*, note 59, at para. 256.

⁶¹ *Id.*, at paras. 85-98. Interestingly, the dissenting judges were rather more preoccupied with the Court’s lack of deference to the *trial judge* than to its refusal to defer to the elected legislature: see paras. 214 and 235.

⁶² *Id.*, at paras. 96-97.

make decisions “on legal principles and not on a socio-political discourse that is disconnected from reality”.⁶³ Unlike the “emotional” participants in public debate, courts are able to take a step back and consider the various positions objectively.⁶⁴ Courts can consider evidence concerning the historical, social and economic aspects of health insurance policy, or any other evidence that may be material.⁶⁵ Courts “have a duty to rise above political debate”.⁶⁶

Similarly, McLachlin C.J. and Major J. took a dim view of the government’s reliance on the policy analysis and recommendations found in reports such as the *Romanow Commission Report* and the *Kirby Committee Report*, noting that “the import of these reports, which differ in many of their conclusions, is a matter of some debate”.⁶⁷ Whereas the earlier cases (reviewed above) had held that governments are entitled to *more* deference when they make policy choices concerning conflicting or debatable social science evidence, McLachlin C.J. and Major J. held that the conclusions of “other bodies on other material” could not displace the Court’s ability to come to its own conclusions on the evidence before it.

This effusive praise for the superior ability of courts to reach objective and evidence-based conclusions on issues of health policy might have been more persuasive but for the fact that the trial judge who heard the expert evidence came to the opposite conclusion on the substantive issue in the case:

La preuve a montré que le droit d’avoir recours à un système parallèle privé de soins, invoqué par les requérants, aurait des répercussions sur les droits de l’ensemble de la population. Il ne faut pas jouer à l’autruche. L’établissement d’un système de santé parallèle privé aurait pour effet de menacer l’intégrité, le bon fonctionnement ainsi que la viabilité du système public. Les articles...empêchent cette éventualité et garantissent l’existence d’un système de santé public de qualité au Québec.⁶⁸

⁶³ *Id.*, at para. 85.

⁶⁴ *Id.*, at para. 16.

⁶⁵ *Id.*, at para. 86.

⁶⁶ *Id.*, at para. 89.

⁶⁷ *Id.*, at para. 151.

⁶⁸ *Id.*, at para. 263.

This finding was affirmed by Forget J.A. at the Quebec Court of Appeal and by the dissenting judges at the Supreme Court.⁶⁹

It is not surprising that the judges disagreed with one another about the probable future effects of expanding private health insurance in Quebec. After all, the expert witnesses in *Chaoulli* disagreed among themselves as to the likely impact that removing the prohibition on private insurance would have on the public plan. The comprehensive public health care reform studies produced by the Romanow Commission⁷⁰ and the Kirby Committee⁷¹ made only equivocal predictions of the effect of parallel private systems on public health care. Indeed, legislators, professionals and members of the public frequently disagree among themselves on these same issues. It is therefore to be expected that judges, like other reasonable and well-informed people, will not all be of the same view with respect to such confounding questions.

More perplexing is the question of why the court felt it ought to determine the issue at all. As Choudhry has commented:

It would have been more honest for both the majority and dissenting judges to acknowledge that public policy in this area is based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available.⁷²

⁶⁹ See [2002] J.Q. no 759 (C.A.), at paras. 61-63, *per* Forget J.A.; *Chaoulli* at paras. 166, 168 and 181 *per* Binnie and LeBel JJ. Neither Deschamps J. nor McLachlin C.J. and Major J. articulated the standard of review to which the trial judge's findings of fact were held. Nor, apart from a quibble over the burden of proof (at paras. 59-60), did these judges expressly find that the trial judge had misapprehended the evidence or failed to properly appreciate the evidence. While appellate courts should not apply the "palpable and overriding error" standard to lower courts' findings of legislative facts in Charter cases, because this would unduly constrain the role of appellate courts in developing broad principles of constitutional law, it nonetheless ought to be incumbent upon appellate courts to explain fully the reasons for their divergent views on evidence adduced at trial.

⁷⁰ Commission on the Future of Health Care in Canada, *Building on Values, The Future of Health Care in Canada Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002), at 139.

⁷¹ Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians — The Federal Role, Vol. 6: Issues and Options* (Ottawa: Senate, 2002), at 42.

⁷² Sujit Choudhry, "Worse Than Lochner?" in Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005), at 75-100.

The proper question for the Supreme Court, consistent with its earlier decisions in areas of empirical uncertainty and competing expert opinion, was whether the impugned legislation responded to the legislature's reasoned apprehension of harm. The government's evidence was more than sufficient to meet that standard. Yet neither McLachlin C.J. and Major J. nor the dissenting judges adverted to the Court's own precedents for deference in the face of conflicting social science evidence, as articulated in *Irwin Toy*, *Butler* and *RJR-MacDonald*. Instead, the judges disagreed with each other at the level of policy as to whether the removal of the prohibition on private insurance would or would not adversely affect Quebec's public health insurance plan in the future.

Given the potential consequences that might result from tinkering with a multi-billion dollar social program that provides services to literally millions of Quebecers, judicial restraint surely would have been preferable. Health care is at the very centre of policy-making in the provinces, and questions about its provision tend to dominate political discourse: "these are the issues upon which elections are won and lost."⁷³ Public health insurance is not an issue at the margins of public policy; on the contrary, it is heavily politically contested and inextricably related to questions of distributive justice, economic planning, taxation levels, and fiscal sustainability. All of these questions call for trade-offs and compromises made on the basis of incomplete knowledge, interjurisdictional comparisons, and best guesses. As the Supreme Court itself noted in *Irwin Toy*, democratic institutions are meant to let us all share in the responsibility for these difficult choices.⁷⁴

⁷³ P.W. Hogg, *Constitutional Law of Canada*, 2006 looseleaf ed. (Scarborough, Ont.: Carswell, 1997), at 44-13.

⁷⁴ *Irwin Toy*, *supra*, note 22, at 993.

