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Entre fédéralistes

by Claude Ryan and André Burelle

August 10, 1999

Monsieur Burelle,

I read with care your latest letter [of August 3, 1999]. Thank you for responding with such courtesy and attention to detail. Your arguments demonstrate a long and deep reflection on these matters. On many points you have given me new insights; however, on other points, I have not been won over to your opinion. In the spirit of frank discussion that has inspired our previous exchanges, I shall try to be more precise in stating my opinion on the debate about the Canadian social union.

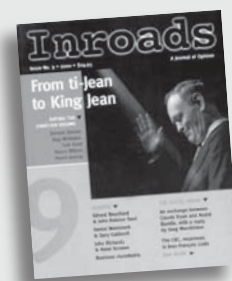
The need to situate this debate within an ideal vision of the Canadian social union, a vision by its nature abstract and encompassing, creates an immediate problem from the Quebec perspective. The Fathers of Confederation wanted to create a new political nationality within which there would be a division of responsibilities and powers between two orders of government. The original division essentially afforded to the provinces responsibility for education, health and social services. Only much later, during the economic crisis of the 1930s, was the federal government called upon to involve itself extensively in social policy. The political culture in the postwar years favoured massive involvement of Ottawa in matters of income security, unemployment insurance, university financing and aid to scientific research. Only following this massive federal involvement did the political demand for clarification of roles and efficient coordination of the actions of the two orders of government become acute. From the idea of clarification and coordination, we have recently evolved to the concept of a social union, with all that this concept implies in terms of generous goals to equalize opportunities,

in terms of national standards and, in the minds of many, increased constraints on provincial autonomy. I note that too often projects advanced in the spirit of a social union have reflected a vision of Canada to which Quebec could not easily adhere.

Projects in the domain of education, culture, health, social services and social policy in general are close to the essence of what makes Quebec a distinct society within the Canadian federation. Even when it knew it would be cornered in a defensive position, Quebec has nonetheless subscribed at various times to the idea of better collaboration between the two orders of government and among the provinces themselves. Usually, Quebec has promoted a functional collaboration around precise goals and has participated only reluctantly in nation-building projects, projects which the other partners of the federation – Ottawa especially – have regularly promoted. When it has accepted to participate in nation-building exercises, the Quebec government, whatever be the party in power, has been careful not to alienate any of its authority and to preserve the maximum of its freedom of action ...

Starting with a basically pan-Canadian perspective, you imagine a viable, coherent and permanent social union resting on acceptance by the federation's partners of common goals and standards. You propose to establish these goals and standards by means of codetermination structures based on European precedents. I come at the subject from a more resolutely Quebec perspective, one that is based on the concrete experience of the federation in recent decades. Based on that experience, it seems improbable to me that we could in the foreseeable future reach the kind of arrangement that you envisage. In an earlier letter, I stated two factors that lead me to this conclusion: first the practical impossibility of defining with clarity the responsibilities of each order of government, and second the great difficulty among the provinces in realizing significant lasting consensus around shared goals. To these two factors I add a third. In order to discuss seriously a project such as you propose, it would be necessary that Ottawa question the powers it exercises, and its manner of governing. In the recent agreement on the social union, we have an eloquent example of Ottawa's tendencies: it succeeded not only in maintaining but in increasing its freedom of manoeuvre.

The goal of a dynamic coherent social union is a noble one. In addition, it is difficult to subscribe to it without – as you quite rightly say – subscribing to a set of mutually accepted



2000 Claude Ryan wrote a critique of the federal-provincial social policy agreement in our 1999 issue, and *Le Devoir* published an excerpt. André Burelle, former constitutional adviser to both Pierre Trudeau and Brian Mulroney, replied in *Le Devoir* and the two then undertook a lengthy exchange of private letters. Ryan sent copies to co-publisher John Richards, who prevailed on them to allow publication in translation. The two letters we reproduce here illustrate well Ryan's "resolutely Quebec perspective" and Burelle's argument, inspired by European precedents, for federal-provincial codetermination of minimum standards. Greg Marchildon, at the time deputy minister to Saskatchewan Premier Roy Romanow, wrote an afterword, defending the social union agreement that triggered this epistolary exchange.

standards. I am suspicious, however, of encompassing versions that planners give of this goal. Already, Canada enjoys in large measure a social union. Better to continue developing it pragmatically rather than via an abstract schema sketched in advance. If we proceed pragmatically, each partner, including Quebec, will be able to engage without feeling obligated to protect its flank. Each partner must be assured that the others will not let it fall en route. If there are to be common standards, they must be established with the participation and agreement of Quebec. To advance, a favourable political climate is required, and currently that is absent. In the currently unfavourable climate, I pose the pragmatic question, how can we strengthen the existing positive elements of a social union? In answer to my question, I offer observations on three subjects tied to the federal spending power: equalization payments, cost-shared federal programs in domains of exclusive provincial jurisdiction and federal transfers to individuals.

With respect to equalization payments, I see no real difference between us, except that I perceive a certain ambiguity in your article in *Le Devoir*. You asked rhetorically, “Can one say yes to equalization payments intended ‘to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation’ and say no to all standards serving to define ‘comparable levels,’ even to minimum standards jointly decided by the provinces themselves?” I answer yes to the first part of your question because, in my opinion, equalization contains its own regulatory mechanism, which is based on the fiscal potential of the provinces. This mechanism seems to me efficient, adequate and respectful of the autonomy of “have not” provinces benefiting from the program. By contrast, it would be an affront to provincial autonomy to envisage other regulatory mechanisms, based on national standards, that a province should satisfy in order to demonstrate it was offering “comparable levels of public services.” Unless I misunderstood you, your rhetorical question opens the door to this addition. Subject to necessary revisions based on technical considerations, I am of the opinion that this program should remain based on the relative fiscal capacity of the provinces. Subject also to necessary consultations with the provinces on details, the decisions on equalization policy should continue to reside with the federal Parliament.

With respect to pan-Canadian shared-cost programs, I maintain that Quebec should be able to opt out, with unconditional financial compensation, from any new pan-Canadian program in an area of exclusive provincial jurisdiction. From my nine years’ experience in the Quebec government, I note that money received from Ottawa for shared-cost programs was allocated to the provincial consolidated revenue fund and not to the ministries having responsibility for the relevant programs. In lean fiscal years, a ministry might be called upon to assume the responsibility arising from a new pan-Canadian program while receiving no new funds, or even a budget reduction. This amounts to shifting the location of the patient’s ailment without improving his overall condition. Given these kinds of distortions and given

the often divergent expectations of Quebecers relative to other Canadians, Quebec is, I believe, perfectly justified in demanding the right to opt out of new pan-Canadian programs in areas of exclusive provincial jurisdiction.

Another consideration. It is relatively easy in the case of shared-cost programs with a precise limited goal to undertake the accounting exercise and establish that funds received as transfers from Ottawa have been applied to the prescribed ends. It is difficult, if not impossible, to do the same in the case of shared-cost programs with imprecise and broad goals. For example, Ottawa frequently expressed misgivings as to what certain provinces did with transfers destined to finance postsecondary education. Various monitoring and verification procedures were advanced, but the problem has never really been resolved. The same problem arises in the case of opting out with conditions: a province must offer a program corresponding in effect to the one from which it wishes to withdraw. In such cases there arise all the difficulties mentioned with respect to Ottawa’s monitoring of shared-cost programs.

When, in 1995, Ottawa eliminated the Canada Assistance Plan and Established Program Financing in favour of the Canada Health and Social Transfer, it sensibly abandoned most conditions attached to social program transfers. With this reform, the great majority of transfer payments (an exception being the standards imposed by the Canada Health Act) are now made unconditionally ... If conditionality is less and less required in the case of established social programs, it would be logical to avoid conditionality when a province considers it appropriate to refrain from participating in a new pan-Canadian program in its jurisdiction, especially if the program is one with broad goals. The principle of opting out was stated in the Meech Lake Accord, the Charlottetown Accord and the ephemeral “provincial consensus” (that crumbled in January 1999 as Ottawa insisted on its version of a social union agreement). In each case, a requirement was added that, in the case of opting out, a province must already possess, or engage to put in place, a program compatible with national goals. The language used to define this requirement was deliberately and dangerously ambiguous. It could give rise, as you stress with respect to the Meech Lake Accord, to multiple contradictory interpretations. It would be infinitely preferable to establish the provincial right to opt out without posing constraints.

Such a regime would create, you fear, a danger of balkanizing the country. I don’t agree, and that for two reasons. We are in agreement that Ottawa should not launch any new pan-Canadian program without first guaranteeing the participation of a minimum number of provinces. Were this number increased to seven or eight (from the present six), the danger of balkanization from opting out would be much reduced. Another consideration. Historically, when the right to opt out exists, it has almost solely been exercised by Quebec. If one wants

Too often projects advanced in the spirit of a social union have reflected a vision of Canada to which Quebec could not easily adhere. — Claude Ryan

to avoid all danger of balkanization, would it not be simpler to recognize that the distinct reality of Quebec justifies that it abstain from certain pan-Canadian programs?

Having read your previous letters, I am now more inclined to accept the idea of a conditional right to opt out, or other solutions, with respect to pan-Canadian programs in areas less closely linked to Quebec's identity. Here, for example, I am thinking of programs in the field of roads, transport and energy ...

With respect to direct transfers to individuals, except for old age pensions and unemployment insurance, there exist no exclusive jurisdictional prerogatives. Either directly or indirectly, each order of government can undertake transfers to individuals. Ottawa has large programs of this nature, but so too do the provinces. The need for better harmonization is widely recognized. How to realize this harmonization remains to be determined.

Personally, I think the formula reached in 1964 for the Canada Pension Plan provides a model well adapted to present Canadian requirements. This formula, including the constitutional amendment required, permitted the entire country to obtain the benefit of an occupational pension program that is essentially the same for all Canadians, but the details were such that today we have two distinct legal and administrative regimes, one for Quebec, administered by Quebec, and one for the nine other provinces, administered by Ottawa. The formula worked well, and continues to do so. As recently as 1998, when it was necessary to accelerate the rate of increase of the premiums, an agreement was reached among Ottawa, Quebec and the nine other provinces to maintain the two systems in harmony. Given the success, both political and technical, of this formula, it is surprising that almost no mention is made of it in the discussions and documents dealing with the social union. The formula was taken up in the Quebec Liberal Party's (1996) constitutional document but, to my knowledge, no one has returned to discuss this model. It embodies, I believe, the best way to organize income security: the two orders of government are empowered to make transfers to individuals but, according to each case, one or the other order enjoys paramountcy ...

I state once again my interest in ideas to improve harmonization of policies with respect to education, culture, health, social services and income security. As much as I believe a spirit of partnership is necessary, I doubt, however, that the addition of codetermination superstructures to structures already in existence is in the current context the best way to proceed. I perceive an important difference between Canada and the European Union. The latter does not have a federal government; it does not have a parliament with real powers ... The European Union can accordingly more easily experiment with partnership formulas where each member state decides whether or not to participate. By contrast, in Canada we have a Parliament and a federal government, invested by the constitution with powers that they have no intention of divesting. Ottawa exercises its powers across the country, and will only agree to exercise them in a consensual manner with the provinces provided the collaborative structures preserve the essence of the status quo ...

We are both anxious to find means within the federation to assure the unity of the whole while respecting the distinct character of Quebec. You place your emphasis on the former goal; I am primarily preoccupied by the second. You promote the goal of a genuine social union based on the postulate of a greater role for the provinces in decision-making. I am concerned whether Quebec will feel at ease in participating in the Canadian social union. I am concerned that any initiative and certainly any final agreement should include clear and just rules concerning situations where Quebec will need to act differently because of its distinct character.

I would like to clarify a passage in your letter [of August 3, 1999] which, as a result of its complexity, left me perplexed. You propose "a rebalancing of the federation based on the following equation: the full and complete constitutional recognition of the distinct character of Quebec society, and the right to local self-government of all provinces in exchange for a reinforcement of the Canadian union based on codetermination by the federation's partners of the common goals and minimum standards needed to guarantee equivalent basic services to all citizens of the country." You add that in this system of codetermination, "Quebec would require unanimity, hence exercise a veto, over any loss of sovereignty in matters which intimately touch the protection of its distinct character."

Two questions arise. First, how do you propose to operationalize the rebalancing you propose? Second, in the event Quebec exercised its veto within the projected structure, what in practice would this amount to? Does it mean the other partners would be prevented from acting because of Quebec's objection? I predict the other partners would never accept to be so constrained. Does it mean the others would be able to act but that Quebec, without being penalized, could stand aside from the proposed action? If you intend this second interpretation, what substantive difference is there between what you envisage and the unconditional right to opt out that I advocate?

I would like to pursue other subjects, notably the questions of strategy that you raise at the end of your letter. But my letter is already too long. My only concluding comment is to note that unfortunately there exists no French-language tribune where these debates can take place publicly, allowing for the serious reflection they deserve.

I assure you that I will profit from your further reflections if you consider it fruitful to write me again.


CLAUDE RYAN

Given the success of the formula reached in 1964 for the Canada Pension Plan, it is surprising that almost no mention is made of it in the discussions and documents dealing with the social union. — Claude Ryan

August 31, 1999

Monsieur Ryan,

I appreciate the intellectual honesty you have displayed in attempting to grasp our divergence of opinion on the future of Quebec in the Canadian federation.

Also, I understand why you approach the debate on the social union “from a more resolutely Quebec perspective” and “based on the concrete experience of the federation in recent decades.” You doubt that we could in the foreseeable future reach the kind of arrangement envisaged in my last letter. In my own analysis of Tom Courchene’s ACCESS report, I wrote:

Having worked for so many years at the federal level, I think that “unitarian” nation-building through the spending power is so embedded in the culture of our federal leaders in Ottawa that it would take almost a “democratic coup d’état” by the provinces to provoke the change of mentality needed to implement even Tom’s minimalist model ... [Federal ministers and public servants] never mention the federal principle of non-subordination, and it never comes to their mind that the central government cannot delegate or devolve powers that already belong to the provinces by virtue of the constitution.

And I added:

I think Tom is more to the point when he writes that the federal government is actually presuming that “the provinces will never get their act together” and that citizens’ support will go to “a strong central role, even a unilateral role” for Ottawa in “monitoring and policing the socioeconomic union.” In fact, if provinces don’t get their act together, I submit that they could very well build a winning platform for the Chrétien government as the “left-wing” saviour of our “national social programs” jeopardized by “right-wing” provinces.¹

Let me add that I am not a Cartesian bureaucrat who, “starting with a basically pan-Canadian perspective ... imagine[s] a viable, coherent and permanent social union resting on acceptance by the federation’s partners of common goals and standards” and who “propose[s] to establish these goals and standards by means of codetermination structures based on European precedents.” On the contrary, in all the studies I directed at the Federal-Provincial Relations Office in Montreal, I started from a number of existential facts that led to conclusions much broader than the matter of a social union.

In summary, I concluded as follows. For a Quebec government, whether it be federalist or sovereigntist, to fall back on a right to opt out, even unconditionally, and to engage in the politics of *la chaise vide*, is to let the rest of Canada manage its affairs without Quebec and, what is fatal, against Quebec. I say fatal because individualistic “one-nation” liberalism,

Trudeau’s heritage to the country, and economic individualistic liberalism, an imposition arising from market globalization, are inherently hostile to Quebec’s communitarian right to be different. Sooner or later, these two dimensions of individualistic liberalism will lead either to a “normalization” of Quebec as a province like the others or to Quebec secession.

Rather than allow matters to drift or suffer a further retreat following a third sovereignty referendum that is either lost or won in a context of ambiguity over wording or margin of victory, I think Quebec *doit forcer le jeu* and conduct a referendum on federalism, one that would clearly carry a majority. This would amount to a democratic coup d’état, designed to obtain, while there is still time, a reform of Canadian federalism allowing Quebec to live its *droit à la différence* within a Canadian federation resolutely modern yet simultaneously faithful to its original refusal of the American melting pot.

To force a response from the rest of Canada, without making it lose face, such a referendum must propose a reform capable of receiving the approval of a large majority of Quebecers while being acceptable, even advantageous, to all other partners of the federation. In other words, it must propose a solution where everyone wins. The conclusions of the working group I headed in Montreal (to which I referred in my previous letter) can be summarized as follows.

- For decades, particularly since patriation of the constitution in 1982, Quebec has demanded from the rest of the country two things: first, constitutional confirmation of its right to form a distinct society within Canada – a distinct civic nation – with French as its common language and with liberal and democratic norms; and second, an updating and respect for the sovereign powers accorded to it by the constitution in 1867, powers Quebec needs to exercise its *droit à la différence* within the Canadian federation.
- At the same time as it faces these traditional Quebec demands, Canada faces two other demands: first, from Aborigines who also want *de jure* and *de facto* recognition of their *droit à la différence* in matters of culture and self-government; and second, from the peripheral provinces (i.e. all those other than Quebec and Ontario) which have called for equal representation in a triple-E Senate and which have also, following the rise of the Reform Party, called for a limitation on the federal spending power and respect for local self-government in a vast, diverse country in which centralized, Ottawa-initiated solutions are often inappropriate.
- Furthermore, all these demands arise at a time when globalization is constraining the political and fiscal margin of manoeuvre of all sovereign states, placing stress on social

“Unitarian” nation-building through the spending power is so embedded in the culture of our federal leaders that it would take almost a “democratic coup d’état” by the provinces to provoke the change of mentality needed. — André Burelle

solidarity, erasing the frontier between domestic and international affairs and forcing the federal government to negotiate more and more treaties in fields of exclusive provincial jurisdiction.

To sketch out what I have called *le mal canadien*² and the remedy I have proposed to overcome our collective malaise, permit me, once again, to refer to my critique of Tom Courchene's ACCESS report.

The sad fact is that ever since the collapse of the Meech Lake Accord, Canada has been experiencing not one but two simultaneous “meta crises,” to speak the language of Richard Simeon. For both what I called the “founding tenet” and the “modern tenet” of the Canadian social and political contract – that is, our initial refusal of the melting pot approach and our postwar search for equal opportunity among citizens and regions – have been brought into question by:

- *our incapacity, as illustrated by the Meech Lake failure, to combine the individualistic liberalism of the Charter of 1982, as defended by former Prime Minister Trudeau and others, with the collective right to cultural distinctiveness of Quebec which was at the heart of the confederation pact of 1867; and*
- *our incapacity, as illustrated by the Axworthy reform failure and the unilateral cuts imposed on provinces by the 1995 federal budget, to consolidate, on a partnership basis, the generous pan-Canadian economic and social programs that are now threatened by the federal debt overload and by the pressures of free trade and the “survival of the fittest” ideology of neoliberals ...*

That is why I reached the conclusion several years ago that, in order to solve those two inextricably interlinked crises, one needed to rebalance our federation on the basis of the following equation:

- *on the one hand, the right to cultural distinctiveness of Quebec and the Aboriginal peoples and the right of all provinces to local autonomy, with the effective decentralization of powers and fiscal responsibility needed to exercise those rights; against,*
- *on the other hand, the obligation of all partners of our federation to jointly decide, through a transparent and responsible Council of First Ministers, as they do in the European Union, the common objectives and minimum common constraints they must abide by in the exercise of their respective sovereign powers, in order to: a) ensure free movement of goods, services, capital and persons throughout the Canadian economic union; b) guarantee basic social services to all citizens of the country; c) harmonize the fiscal and budgetary policies and coordinate the exercise of the sovereign powers of both orders of government; and d) permit the country to speak with one voice in a globalized world where the federal government is asked more and more often to sign international treaties in fields of exclusive provincial jurisdiction.³*

From my perspective, the most serious failure of the ACCESS report was to have ignored the crisis of the founding tenet of the Canadian social contract (i.e. the rejection of Quebec's *droit à la différence* by the adversaries of Meech) and to have broken the win-win logic of rebalancing the federation I had proposed. The ACCESS report attempted to resolve in isolation the crisis of the modern tenet of the Canadian social contract (i.e. the downsizing and control of major social programs elaborated since World War II) in isolation from the other. I responded to Courchene – who claimed to be inspired by my book (*Le mal canadien*) – with the following:

The main purpose of a pact on the Canadian social and economic union I proposed was political and cultural, as much as it was social and economic: namely, to move away from nation building based on the federal spending power at a time when Ottawa could no longer afford to spend, and to consolidate our economic and social union on a partnership basis, in full respect of provincial powers and in full compliance with the “refusal of the melting pot approach” that was at the heart of the Canadian social and political contract of 1867... Given the fact that we almost lost the last Quebec referendum, I feel strongly that one cannot choose only the social and economic side of that proposal and ignore its cultural and political side without sacrificing the feasibility of the whole reform [emphasis added here – AB].⁴

Please excuse these long extracts from my critique of Courchene's ACCESS report. I have used them because they apply to the social union agreement negotiated this year. Also, they go to the heart of the questions you pose to me at the end of your letter.

Your first question is the following: “How do you propose to operationalize the rebalancing you propose?”

Having read this far, you will not be surprised by my reply. In my opinion, one cannot resolve separately the two inextricable crises of the country I have described. Furthermore, one cannot challenge successfully Ottawa's unitary nation building and its domineering federalism, which the provinces outside Quebec more or less voluntarily accept, without what I have called above a successful democratic coup d'état. Therefore I see only one way to operationalize at the political level the reform I propose, namely to ask Quebecers by means of an unequivocal referendum to give their government the mandate to negotiate a win-win rebalancing of the Canadian federation ...

As I stated in my previous letter, immediately after the failure of Meech in the context of the Bélanger-Campeau Commission, Premier Bourassa could have made Ottawa and the rest of the country act, without the need for a prior referendum, because at the time the evidence of a democratic coup d'état was obvious. He was aware of the broad outline of the

I see only one route to salvation for Quebec: take the initiative by holding a winning federalist referendum and thereby avoid the twin dangers of living through a new sovereignty referendum or suffering a war of attrition with the rest of Canada. — André Burelle

rebalancing project I presented to the federal cabinet committee mandated to respond to Bélanger-Campeau. It would have been sufficient for him to have placed that project on the table, reworking it if necessary. Instead, Bourassa passively waited for an offer from the rest of Canada and was obliged to sell to Quebecers the formless Charlottetown Accord.

The almost lost referendum of October '95 and the financial crisis of the federation could also have served as a motive to bring about a rebalancing of the federation. After the unilateral cuts imposed on the provinces in 1995, the provinces outside Quebec – with Ontario, British Columbia and Alberta in the lead – were ready to do battle. But once again, Quebec chose to play the politics of *la chaise vide*, and in the end found itself faced with a social union agreement impossible to sign given the other provinces' endorsement of Ottawa's near-unconstrained exercise of its spending power and virtual trusteeship.

After this string of failures to renew the federation, I see only one route to salvation for Quebec: take the initiative by holding a winning federalist referendum and thereby avoid the twin dangers of living through a new sovereignty referendum or suffering a war of attrition with the rest of Canada.

Subsequently, you ask the following: "In the event Quebec exercised its veto within the projected structure, what in practice would this amount to? Does it mean the other partners would be prevented from acting because of Quebec's objection? I predict the other partners would never accept to be so constrained. Does it mean the others would be able to act but that Quebec, without being penalized, could stand aside from the proposed action? If you intend this second interpretation, what substantive difference is there between what you envisage and the unconditional right to opt out that I advocate?"

In reply, I begin by reminding you that the rebalancing I propose presupposes a paradigm change and a complete inversion of the logic of intergovernmental negotiations that have prevailed over the last half century.

The project sketched in *Le mal canadien* does not envision provinces opting out from national shared-cost programs in areas of provincial jurisdiction. What it does envision is that Ottawa withdraw from areas of provincial jurisdiction, returning to them the fiscal room necessary to fulfil their constitutional responsibilities. In effect, I submit that the central government is beholden by the constitution to play the role of equalizing opportunities across the federation but, at the same time, it is beholden to respect the federal principle of non-subordination of the provinces and of assuring their fiscal capacity. From this flows a double obligation on the Parliament of Canada:

- equalization should be the sole means whereby Parliament transfers funds "to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation ability to provide reasonably comparable services, within their domains of exclusive jurisdiction, at comparable levels of taxation";⁵

- in all domains where the provinces have exclusive or paramount jurisdiction, Parliament should decide transfers to individuals, whether direct or via tax expenditures, on a basis of codetermination with the provinces.

In this scenario Parliament cannot cut social transfers to the provinces as a means to bring them to heel. But the constitution does oblige Parliament, jointly with the provinces, to guarantee to citizens comparable services at comparable levels of taxation. This obligation justifies an insistence that, in exchange for equalization, the provinces force themselves, by a mechanism of codecision, to respect common goals and the minimum common standards necessary to assure equivalent social services across the country.

In fact, the provinces have already put in place a regime based on minimum common standards and mutually agreed equivalence of services when they agreed among themselves on the reimbursement for health services provided to their respective residents in other provinces. I propose to formalize this process, placing it in a system of European-inspired codetermination ... And, to protect its distinct character, Quebec will have to undertake a winning federalist referendum and use the political bargaining power gained in that referendum to demand a unanimous codecision rule (i.e. a veto for all provinces including Quebec) in areas closely related to the preservation and affirmation of its cultural and institutional specificity.

The final question posed – and here I repeat a portion of my previous quotation from your letter – is, "What substantive difference is there between what you envisage and the unconditional right to opt out that I advocate?"

The right to veto certain matters, a right shared by all provinces, would be exercised not in the spirit of opting out but in the spirit of opting in. That makes all the difference.

When one insists on an unconditional right to opt out with financial compensation, one says to the rest of Canada – consciously or not – decide common actions, common goals and common standards however you wish, they do not concern us. One is expressing a desire not to participate in the Canadian union and, in the minds of many, one is equating Quebec's *droit à la différence* to what Trudeau called *séparation à la pièce*. The result will inevitably accentuate hostility in the rest of Canada to any constitutional recognition of Quebec's distinct character.

What's more, opting out is irrelevant when Ottawa offers financial or tax subsidies to individuals or organizations in areas falling under areas of exclusive or paramount provincial jurisdiction. Without a codetermination mechanism capable of binding the two orders of government, you are at the mercy of Ottawa's power to subsidize. In practical terms, the same

The right to veto certain matters, a right shared by all provinces, would be exercised not in the spirit of opting out but in the spirit of opting in. That makes all the difference. — André Burelle

applies to Ottawa's power to sign treaties in areas of exclusive provincial jurisdiction. The provinces can refuse *post facto* to deliver what Ottawa's negotiators promised, but only at the high cost of loss of credibility in financial, commercial and diplomatic circles.

By contrast, if one calls for a federal withdrawal from all areas of provincial sovereignty with a corresponding federal grant of tax room, and if one sets in place a mechanism capable of replacing Ottawa's unilateral standards with common goals and minimum standards decided either on an interprovincial or federal-provincial basis ... then it becomes impossible for Ottawa to justify its unilateral resort to the spending power as means to discipline the provinces.

With this kind of opting in, Quebec shows its willingness to participate in the Canadian union and associates the exercise of its *droit à la différence* with acceptance of minimum shared goals and common standards – provided these constraints are minimal and freely accepted by Quebec, operating within a system of codetermination. As I said earlier, this system would require unanimity for certain decisions, thereby permitting Quebec to oppose any constraint that unnecessarily imposes uniformity in areas relevant to preservation of the province's distinct character ...

There, you now have the reflections inspired by your letter of August 10. I have repeated my arguments more than I would have liked. For this I apologize. I hope nevertheless that you draw as much pleasure and profit from reading this letter as I drew from considering the penetrating questions and objections you raised.

With the assurance of my friendship and consideration,

ANDRÉ BURELLE

Notes

¹ André Burelle, "Canada Needs a Political as Well as a Social and Economic Covenant," in *Assessing AC-CES: Towards a New Social Union* (Kingston, ON: Queen's University, Institute of Intergovernmental Relations, 1996).

² André Burelle, *Le mal canadien* (Montreal: Fides, 1995).

³ Burelle, "Canada Needs a Political as Well as a Social and Economic Covenant."

⁴ Ibid.

⁵ Constitution Act, 1982, s. 36(2).

Multiculturalism

As Canadian as apple pie

by Garth Stevenson



1995 The title captures more than the content of this 1995 article written by political historian Garth Stevenson of Brock University. It also captures an element which was to prove characteristic of Inroads' approach: kicking sacred cows, in this case the assumption that multiculturalism was something distinctly and admirably Canadian. Stevenson set out his contention as follows:

As concept and symbol, multiculturalism may serve a number of purposes. For Trudeau, its primary purpose was to undermine and destroy the older ideological symbol of "deux nations." For some allophones and members of visible minorities, it may convey the promise that their claims to equality and justice will be recognized. For my students, and for traditionally nationalistic Ontario, its main attraction seems to be that it distinguishes Canada from the U.S.

But does it really? The concept of multiculturalism, although of recent origin, does have some affinities with a concept with some plausible roots in Canadian history, that of the Canadian mosaic. Similarly, the concept of the "melting pot," a once powerful ideological symbol in the U.S., has some plausible roots in that country's history. However, the actual historical development of both countries has been more complex than the popular symbols would suggest. Furthermore, recent parallels between the two are as interesting and significant as the contrasts. In the end, multiculturalism turns out to cause more harm than good, and is entirely unhelpful in securing independence from the U.S.

After tracing differences and similarities in attitudes in the United States and Canada over time, the article – here in abridged form – continues.



It IS THUS INCORRECT TO STATE THAT CANADA LACKS A MELTING POT tradition. It arose and gained support at the time a similar tradition was explicitly formulated in the U.S. Its continuity can be traced through John Diefenbaker's notion of "One Canada" to Preston Manning's Reform Party. Manning's view of bilingualism and multiculturalism as special privileges for distinct groups is strikingly reminiscent of Dalton McCarthy's Equal Rights movement ...

Apart from French Canada, two other forces have reinforced the Canadian mosaic. The first was the fact that Canadians of British ancestry wished to retain their British roots and traditions. Not really wishing to become unhyphenated Canadians themselves, they had difficulty persuading others to do so. British Canadians would not trade the rights of Englishmen for the rights of man, or the reflected glories of the Empire for a Canadian identity that might have included their fellow Canadians. The second force was anti-Americanism, as the sociologist S.D. Clark has explained most clearly. In 1950, Clark noted that the

frontier had served as a melting pot in both North American countries but that Canadian elites had resisted this tendency so as to preserve the colonial character of Canadian society¹ ...

In sum, the legacy of Canadian history and the complex character of Canadian society prevented either the melting pot or the mosaic philosophy from gaining hegemony. The former was strong in provincial politics and in populist movements. The latter reigned supreme in Quebec and dominated the two major parties at the federal level, Diefenbaker notwithstanding. The Liberals' early espousal of a melting pot philosophy came to an end as the populist roots of that party withered away under Laurier's leadership ...

Meanwhile, south of the border, by 1963 two noted students of American ethnicity maintained that the melting pot theory was no longer useful or credible, if it ever had been. In *Beyond the Melting Pot*, Nathan Glazer and Daniel Patrick Moynihan concluded that ethnicity had persisted in the U.S. and seemed likely to do so indefinitely, reinforced by race and religion. By the time the second edition appeared in 1970, evidence had accumulated to prove them right.

Multiculturalism: Trudeau's invention

The Royal Commission on Bilingualism and Biculturalism, which seemed to mark the triumph of Henri Bourassa's vision of an equal partnership between two founding peoples, actually contributed to its disintegration. Its public hearings encountered considerable resistance to the notion of English-French duality. The Commission was forced to devote an entire volume of its report to "the contributions of other ethnic groups" in an effort to preserve its own legitimacy. One result of its efforts was to turn French Canadians and "other ethnics," traditionally allies against the melting pot tendencies of English Canada, into adversaries. The more sophisticated opponents of Quebec nationalism saw their opportunity.

Pierre Elliott Trudeau borrowed from his favourite philosopher, Lord Acton, the idea that a truly liberal state should not be dominated by one ethnic group because it will use its power to oppress other groups and provoke a reactive nationalism on their part. Trudeau viewed French Canadian nationalism, which tried to use the Quebec

government for nationalist ends, as a reaction against British Canadian nationalism, which had tried to use the colonial state, and later the federal state, for nationalist ends. But if one group is a majority, how can it be prevented from dominating?

The answer is to have no majority. If no group is large enough to dominate, government will have to be based on compromise, and the evils of "nationalism" will be avoided. (English Canadians were slow to realize that when Trudeau denounced "nationalism," he meant loyalty to an ethnic group, not loyalty to the state. The different meanings of *nation* in the two languages caused considerable confusion.)

Official multiculturalism, a policy first proclaimed by Trudeau in the House of Commons on October 8, 1971, thus served several related purposes. It was a *quid pro quo* to "other ethnics" for the 1969 Official Languages Act. It was a reminder to Quebec nationalists that the French were only one of several ethnic groups. It was a warning against any effort by Quebec to create its own melting pot, an effort already urged by many nationalists (and undertaken a few years later with Bill 101). Finally, multiculturalism was intended to ensure that the Canadian state would never again be an instrument of British Canadian nationalism by dissolving "English Canada" into a congeries of different ethnic groups. If there was no majority, according to this Actonian reasoning, French Canada did not have to worry about being a minority. In a sense multiculturalism was an updated version of the British imperial policy of divide and rule.

Multiculturalism was quickly endorsed by the opposition parties and soon adopted as policy by several of the provinces, with the conspicuous exception of Quebec.

One reason for its rapid acceptance was its apparent resemblance to the more familiar notion of the Canadian mosaic. Another was its un-American symbolism, at a time when anti-Americanism in Canada was especially high. Still another was that most non-French Canadians preferred multiculturalism to equal partnership between French and English, including those who would have preferred a more “British” definition of the country. Significantly, the popularity of the concept only began to decline after non-white and non-European groups replaced the Italians and Ukrainians as its most obvious beneficiaries, and the Mulroney government shifted the focus of multiculturalism policy from the dubious notion of encouraging cultural differences to the more praiseworthy objective of combating racism.

Meanwhile, multiculturalism had been entrenched in Canada’s constitution. Section 27 of the Charter of Rights and Freedoms directs that “this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” In his statement of October 8, 1971, Trudeau asserted that in Canada “there is no official culture.” If it is true, this statement apparently does not have a meaning analogous to the statement that in the U.S. there is no official religion. While the U.S. government avoids any involvement in religion, even to the point of refusing to take note of it in the census, the Canadian government is heavily involved in culture, to the tune of more than \$1.5 billion annually. Indeed, if there is no official culture, why have a policy? Presumably because the market cannot be counted upon to produce the results that Lord Acton would have preferred.

An even more serious contradiction concerns the concepts of individual and collective rights. In Trudeau’s political thought individual rights have always been of primordial importance, and collective rights viewed with suspicion. Multiculturalism was valued because it allegedly made individual rights more secure, not as an end in itself. Yet multiculturalism, if taken seriously, has undeniable collectivist implications.

These collectivist implications have surfaced most clearly, and most ominously, in the form of demands by various ethnic groups for symbolic and even financial compensation for past wrongs allegedly perpetrated by the Canadian state. First it was the Japanese Canadians protesting against their internment and resettlement during the Second World War. When the government capitulated to their demand for apology and compensation, Chinese Canadians demanded similar redress for a tax on Chinese immigration imposed a century earlier. Then Italian Canadians demanded compensation for the internment of suspected fascists (about 1 per cent of the Italian-Canadian population) during the Second World War. After Mulroney apologized for that episode, Ukrainian Canadians demanded compensation for the internment, during the *First* World War, of some of their ancestors who had emigrated from Austria-Hungary. Even a group of Franco-Ontarians is trying to take the government of Ontario to court for “cultural genocide.” Note that in the nature of collective rights, no injury to actual living persons need be claimed, much less proved.

Even the most vehement supporters of official multiculturalism are beginning to resist the financial implications of such demands. In December 1994, one week after denouncing Neil Bissoondath’s critique of

multiculturalism, Sheila Finestone, Minister of State for Multiculturalism and Trudeau’s successor as Mount Royal MP, announced that the government would no longer consider financial redress for any wrongs inflicted on ethnic groups by previous governments. The government, she said, could not rewrite history. Spokesmen for the Chinese, Italian and Ukrainian ethnic lobbies reacted angrily.

The pot that didn’t melt

While all this has been going on in Canada, there have been parallel developments in the U.S. The word *multiculturalism* has surfaced also to become a subject of great controversy. As in so many other respects, the two countries appear to be converging, even as Canadians turn a blind eye to the fact and insist on their own distinctiveness.

The publication of *Beyond the Melting Pot* in 1963 coincided with the end of an era in U.S. ethnic relations. Martin Luther King, Jr. brought his campaign for Afro-American civil rights to Birmingham, Alabama, and President Kennedy brought civil rights to centre stage in his administration. Kennedy’s civil rights legislation would be adopted in the following year, and Johnson’s Voting Rights Act a year later. Increasingly, however, Afro-American militants replaced the original goals of “integration” and “civil rights” by “Black Power,” collective rights and quasi-separatism. They contended that Afro-Americans would continue to be, as they always had been, excluded from the melting pot, that integration would, at best, benefit a relatively small black middle class. Instead, they emphasized their African “roots” and alleged cultural distinctiveness vis-à-vis white America ...

Perhaps the most significant developments in ethnic relations in the U.S. involved the so-called “Hispanic” population. Like the Canadian term *francophone*, *Hispanic* is a generic term covering a number of distinct groups, which include Puerto Ricans, Cubans, Mexicans and the indigenous “Chicano” element in the southwest which predates the acquisition of the territory from Mexico in 1845. Largely because of rising immigration, legal and otherwise, “Hispanics” are increasing much more rapidly than the population as a whole. Following the example of Afro-Americans, they have come to expect a proportionate share of political appointments and nominations and of access to education and opportunity. Perhaps more ominous demands include bilingual or Spanish-language education, which already exists in some areas, and the availability of Spanish-language services from all three levels of government.

The erosion of the melting pot concept has also been reflected in the census. The 1970 census was the first to attempt to determine the total number of “Hispanics,” although Mexicans had been counted separately since 1930. In 1980, the U.S. census for the first time followed Canada’s example of asking ethnic origin.

Even the expression *multiculturalism* has entered the American vocabulary, although with no acknowledgement of its Canadian origins. Jesse Jackson in his attempt to build a “rainbow coalition” was perhaps the first prominent politician to use the term, but since that time it has become generally familiar. On the other hand, the term *melting pot* has largely acquired connotations of forced assimilation or even racism and is rarely used by Americans except in a hostile or ironic sense. Bilingual education, which

was widespread before the First World War, has been revived in many states and been subsidized by the federal government since 1968 ...

In actual fact there has probably been more resentment among Afro-Americans than among Euro-Americans against the new multiculturalism. Increasing emphasis on the goals of Hispanic Americans has tended to deflect attention away from the still unresolved problems of Afro-Americans. The social and economic progress of some relatively recent immigrants, as contrasted with African Americans, has not failed to attract attention. (Canadians may recall the reaction in Quebec when the Dunton-Laurondeau commission revealed the fact that French Canadians ranked near the bottom among ethnic groups in average income.) Resentment seems to focus specifically on certain immigrant groups, notably the Koreans who often operate small stores and other businesses in neighbourhoods with large Afro-American populations.

Increasingly ethnicity in American life is being defined as a zero-sum game between Euro-Americans, Afro-Americans, Asian Americans and "Hispanics." (The fact that the last of these is a linguistic rather than a racial classification and thus overlaps with the others is usually disregarded.) Jesse Jackson notwithstanding, the rainbow coalition is a long way off.

Where do we go from here?

Clearly the two North American federations have far more in common so far as ethnicity and ethnic politics are concerned than the traditional stereotypes would suggest. The ideological partition of the continent in 1783, and the fact that French was origi-

nally, and rather ironically, the predominant language on the "British" side of the new boundary, led to some significant differences, differences sustained by the fact that Canada encouraged large-scale immigration from continental Europe during most of the period when the U.S. restricted it under the quota system. But developments since the 1960s have caused the two countries to converge.

The Quiet Revolution in Quebec and the civil rights revolution in the southern states gave ethnic questions a prominent place on the political agenda at the same time as the increasing weight of immigrants of non-European background altered the ethnic composition of the cities of both countries. The result has been increased emphasis on ethnicity and friction between the traditionally contending groups: English and French in Canada, Whites and Blacks in the U.S. French Canadians and Afro-Americans have on balance been more hurt than helped by the new emphasis on the problems and objectives of immigrant groups.

A recent study by two of Canada's leading sociologists presents strong evidence of convergence, undermining the contrasting stereotypes of melting pot and mosaic.² Jeffrey G. Reitz and Raymond Breton examined attitudes toward the retention of minority cultures, the degree to which minorities actually retain their cultures, the extent of prejudice and discrimination, and the incorporation of ethnic minorities in the economy. They found few significant differences between Canadians and Americans. Furthermore, one that they did find contradicts the stereotype: Americans were more supportive of cultural retention by minorities than Canadians, not less.

Some significant differences remain. Quebec has no counterpart in the American federation, although this could change in the long term if one or more southwestern states become predominantly Spanish-speaking. And Canada, largely because of its determination to resist absorption by the U.S., has a much stronger tradition of involvement by the state in "culture." But these do not constitute a valid reason why "multiculturalism" should assume such a prominent place in the symbolic order of Canada as it has assumed recently.

In reality, multiculturalism does not in fact distinguish Canada from the U.S., it causes anxiety in Quebec and increasing resentment in anglophone Canada, and it is a highly questionable blessing for ethnic minorities, as Neil Bissoondath, among others, has recognized. For most of them, individual opportunity and participation in the mainstream of Canadian life are higher priorities than collective "rights" to cultural retention and the refighting of historical controversies.

Given the difficulties of the amending process, Section 27 can probably not be removed from the Charter. There are other ways in which Canada can retreat from its ill-advised policy of official multiculturalism. The Mulroney government moved in the right direction by downsizing the Ministry of State for Multiculturalism and shifting from cultural retention toward combating racism. Cultural assimilation and equal opportunities for all are in the long run the best defences against racism.

Another desirable step would be to eliminate the ethnic question from the Canadian census, while retaining the questions dealing with language. The ethnic question originally had the primary purpose

of measuring the weight of the francophone minority but the language questions now do so in a more accurate and acceptable manner. The accuracy and reliability of the ethnic data have always been questionable, and since they do not measure the degree of assimilation they are largely irrelevant in any event. Their chief consequence is to encourage inflated claims by various "ethnic" lobbies as to the number of people they allegedly represent. In the last Canadian census more than 765,000 persons, mainly in Ontario, defied the instructions on the form and wrote in their ethnic origin as "Canadian." Where is John Diefenbaker now that we need him?

Canada, to its credit, is a land of immigration, as is the United States. However, immigrant-receptive polities work best when the natural process of integration into the community is allowed to take its course. Ethnic diversity caused by immigration is very different from ethnic diversity caused by territorial expansion, like that of the former Soviet Union and (Lord Acton's favourite example) the Austro-Hungarian empire.

"Multiculturalism" is a dysfunctional symbol and a misguided policy insofar as it blurs this fundamental distinction. It is time to let Lord Acton rest in peace. ■

Notes

¹ S. D. Clark, *The Developing Canadian Community* (2nd edition; Toronto: University of Toronto Press, 1962) pp. 195-196.

² Jeffrey G. Reitz and Raymond Breton, *The Illusion of Difference: Realities of Ethnicity in Canada and the United States* (Toronto: C.D. Howe, 1994).

Judging the judges

Interviews with Allan Blakeney and Patrick Monahan

GARETH MORLEY: You have long been known for being sceptical about constitutionally entrenched bills of rights, like Canada's Charter of Rights and Freedoms. In 1981, you joined with seven other premiers in resisting Pierre Trudeau's plan to unilaterally repatriate the constitution with a judicially enforced charter. Saskatchewan was instrumental in putting the "notwithstanding clause" into the Charter, allowing Parliament and provincial legislatures to override judicial interpretations of most rights in the Charter as we now have it. What are your concerns about letting judges strike down laws on the grounds that they infringe Canadians' fundamental rights and freedoms?

ALLAN BLAKENEY: We cannot be sure that a charter or bill of rights will improve respect for human rights and civil liberties. The United Kingdom has never had a written constitutional bill of rights and Canada did not have one until 1982. Neither country

has been perfect in respecting civil liberties or human rights, but comparatively, Canada's record was, and the U.K.'s record continues to be, as good as anywhere. The United States of America has had a Bill of Rights since shortly after it was founded, but for 70 years this Bill of Rights coexisted with chattel slavery. So we can't say that a country will respect human rights more just because it has rights written into its constitutional document.

What we can say for sure is that any written bill of rights transfers power from voters and governments to judges. Constitutional provisions do not interpret themselves: judges do. Almost all the difficult questions can be considered as conflicts between one group's rights and another group's or individual's. A written bill of rights means that more of the decisions as to whose rights will prevail in a particular situation will be made by judges and fewer by elected politicians.

Judges may be more respectful of human rights than politicians, and they may be less. Judges are drawn from lawyers, indeed from the legal elite. Without overgeneralizing, I think I can say that you become a part of the elite of the legal profession by being a handmaiden of the business establishment. When I practised law, my work came from business. For the most part, it was small business because big business didn't look upon me, as a former CCF cabinet minister, with favour. Some small businessmen didn't care. But still, my clientele was hardly a cross section of the electorate.

So judges are members of the legal elite, and therefore handmaidens of the business establishment, who are then appointed by the same politicians we are supposed to be suspicious of.

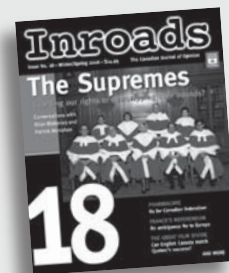
Judges are not accountable to the public. They are not *supposed* to be accountable to the public: that is what judicial



Allan Blakeney

independence means. They make their decisions on the basis of information provided to them by the parties to a particular lawsuit. That information is *supposed* to be narrowly focused on the disagreements between the parties to the suit.

Government's core functions, on the other hand, are to make and enforce laws, to raise taxes and spend them. You can always say that the way they do these things infringes somebody's rights. If we have waiting lists for surgery in Quebec, then someone might die. You can say that will infringe their right to life or their security of person. But if you spend more on health care, you spend less on highway maintenance or on prisons. And guess what? Spending less on highway maintenance means someone will die. Spending less on prisons means someone will die. If you gave me \$50 million to spend solely on saving lives, I certainly wouldn't spend it on the health care system.



WINTER/SPRING 2006 Canadian courts now interpret the Charter of Rights and Freedoms as a mandate to redesign the country's core social programs. In 2005, in its decision in *Chaoulli v. Quebec (Attorney General)*, the Supreme Court decided that Quebec's legislative ban on private insurance for basic medical services violated the Charter. Spurred by the *Chaoulli* decision, we published two interviews on the growing judicial role in Canadian politics. Gareth Morley interviewed Allan Blakeney, who as Premier of Saskatchewan played a key role in the negotiations leading to the adoption of the Charter in the early 1980s. Blakeney's conclusion: "The conventional wisdom is that our splendid parliamentary system, with a wise electorate, somehow elects

only fools and knaves. Fools and knaves who appoint judges who are wise." In a companion piece, Finn Poschmann interviewed Patrick Monahan, Dean of Osgoode Hall Law School, who had argued before the Supreme Court on behalf of Chaoulli's challenge to medicare. For him, the Charter poses few problems. His conclusion: "The courts are doing their job."

The people deciding what to spend money on, and what laws to make and enforce, need to consider what the tradeoffs are. And they need to consider what the people want. For some reason, there is a lot of criticism of governments' looking at polls to see what the people want. Well, in my opinion, what the people want is very relevant to what should be done. It is far from definitive, but it is relevant.

Even if the courts make the "right" decision, it breeds distrust of the political process. It trains the public to think that if you want change, you go to the courts. And disengagement from the political process is a real problem for Canadian democracy. Even if change comes more slowly through the political process, it is more secure.

GARETH MORLEY: Do you see a positive role for court supervision of governments?

ALLAN BLAKENEY: Absolutely. Courts can check governments in at least five ways.

First, they can supervise the police and minor judicial officials to ensure that they are respecting the civil rights of people caught up in the criminal justice system. Second, they can supervise public officials – bureaucrats – to make sure they act within the powers the law gives them. Third, they can supervise slips or unconscious infringements of someone's rights that legislatures make from time to time. Fourth, and most difficult, they can apply a check on the political process when it mistreats unpopular or isolated minorities who cannot defend themselves in the ordinary democratic system. Fifth, they can employ a substantive political theory of rights to second-guess the major policy decisions of government – what laws to make, who and how much to tax, what to spend money on.

The first four functions are appropriate for courts, in my opinion, and were what we tried to make possible in the Charter; the fifth, however tempting for courts that see something they think is wrong, is illegitimate and dangerous ...

GARETH MORLEY: After the Court ruled that there was a convention requiring substantial provincial consent, Trudeau reopened negotiations. Those negotiations resulted in the November 1981 deal, which you and Roy Romanow for Saskatchewan helped broker, and which all the provinces except Quebec agreed to. Why did Saskatchewan sign on to the patriation deal?

ALLAN BLAKENEY: We had to come up with a deal. The public expected it. We all wanted to see the Constitution patriated and an end to the constitutional debate. Saskatchewan's primary objectives – clarification of provincial jurisdiction over resources and a notwithstanding clause – had been met. The conventional wisdom now is that Quebec was excluded. It wasn't as clear then. All but two of Quebec's federal MPs supported the constitutional deal.

Sometimes I wonder whether it would not have been better if the Supreme Court of Canada had responded only to the "legal" issue in the *Patriation Reference*, and had just said that the federal government could unilaterally patriate the constitution with a bill of rights and its own amending formula. Then Trudeau would have done so, with eight of the provinces against him. We would have been mad as hell, but Quebec would not have been isolated. There would have been eight provinces mad as hell instead of one. It might have been better for the country in the long run. But that is just a "might have been."

GARETH MORLEY: Before we discuss the Charter of Rights that you and the other first ministers agreed to, I want to ask you how much you think it matters. How much should the courts be bound by what the politicians thought they were doing at the time?

ALLAN BLAKENEY: Quite a bit at first, and decreasingly over time. We are all in favour of treating the Constitution as a "living tree."¹ But I don't think it is right for the courts to decide that they don't like the tree we planted, dig it up and transplant another species. The speed with which the Court renounced what the politicians and, I would argue, the public, thought it meant was astounding.

The most important example is section 7.² *Everyone* involved was very clear that they did not want this to include the concept of "substantive due process," the concept the American courts before Roosevelt had used to strike down progressive legislation. We were prepared to countenance the judges' deciding whether the process governments use when they affect liberty or security of the person was adequate, but not to second-guess whether legislation was substantively fair or just.

Judges, as lawyers, have some insights into what kind of processes should be put in place – whether to require cross-examination, how to determine bias and so on. But, as lawyers, they have no particular insight into the substantive reasons for legislation. Under the Diefenbaker Bill of Rights, "principles of fundamental justice" were held to be purely procedural.³

The federal government could not have been clearer that the principles of fundamental justice were purely procedural.

The main federal drafter was Barry Strayer, now Mr. Justice Barry Strayer of the Federal Court of Appeal. He repeatedly said that this was not going to include substantive due process. It was going to just be procedural due process.

Unfortunately, as Chief Justice Hughes of the U.S. Supreme Court said when he was a lowly politician, "The courts are bound by the Constitution, but the Constitution is whatever the courts say it is." Within a very few years, the Canadian Supreme Court decided that they were not going to be

Sometimes I wonder whether it would not have been better if the Supreme Court had just said that the federal government could unilaterally patriate the constitution. Then Trudeau would have done so, with eight provinces against him. We would have been mad as hell, but Quebec would not have been isolated. — Allan Blakeney

second-class judges and section 7 was going to include substantive due process.⁴

We can now see where this ends up. The latest decision about private medical insurance in Quebec⁵ is an excellent example of the Court making a decision outside its proper ambit. The Court said that government should not stop someone from obtaining private health care insurance because this may risk life and infringe security of the person.

I make the obvious point that decisions about health care are not the only decisions made by provincial legislatures which risk the lives and security of citizens. Many decisions of government threaten lives. Should there be more police? Should speed limits

on highways be lowered or raised? Should a two-lane highway be expanded to a four-lane highway? Should housing be provided for low-income people? These decisions and many more can be shown to risk the lives and security of citizens. If I read the judgement correctly the court believes that these decisions would “engage section 7” and require governments to justify in court why the decisions were made. This is not a rational approach to government.

The essence of government is making choices. Legislatures make laws and enforce them. They raise taxes and they spend them. How you do that is what politics is all about. Well, after this decision, these choices are

We are all in favour of treating the Constitution as a “living tree.” But I don’t think it is right for the courts to decide that they don’t like the tree we planted, dig it up and transplant another species. — Allan Blakeney

no longer to be left to those accountable to the voters. If we have private care, it will inevitably affect the public system. Who is going to provide the private care? Are they going to use public hospitals? Are they going to use doctors trained at public expense? These are surely questions that affect all the people of Quebec. There might well be a place for private health insurance. But these issues have to be addressed.

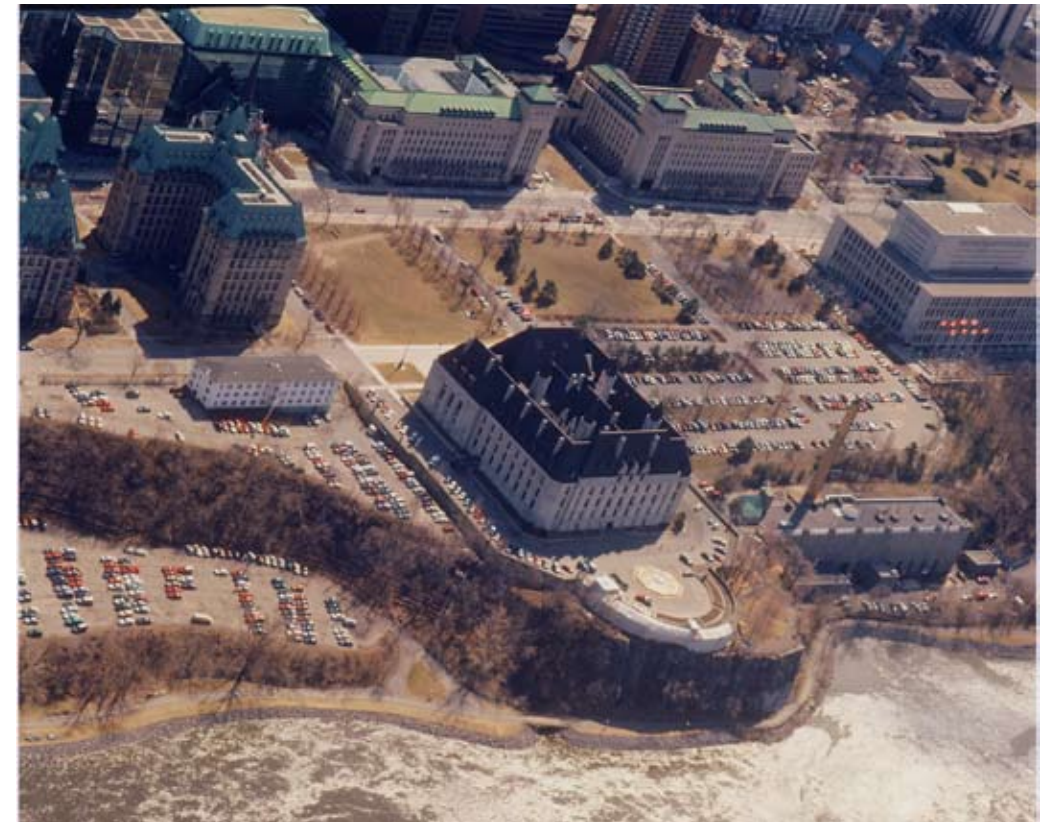
The question about how to reform our health system has hardly gone unnoticed at election time. People who want private health insurance are not a helpless minority, like the ones protected by section 15 of the Charter. The Court should not have gotten involved.

GARETH MORLEY: What about the fundamental freedoms, of expression and religion and so on, set out in section 2?⁶ Do you think the Court’s decisions with respect to those freedoms are consistent with the 1981 deal?

ALLAN BLAKENEY: Not entirely, no. We did not intend to constitutionalize commercial advertising.⁷ Again, we wanted to avoid having the courts decide matters of economic policy. That is why I persuaded Trudeau to drop property rights (he did not really care about it one way or the other). I was vigorous on that score. Not because we wanted to see the government take somebody’s home without paying for it – which is not a problem in Canada. But because, inevitably, property rights involve issues like the boundaries of intellectual property and revenues from resource tenures and other issues that should be decided democratically and politically.

I believe we thought that the fundamental freedoms were there to protect political and ideological diversity and debate – in a broad sense, certainly including artistic and cultural expression. There is obviously room for reasonable people to disagree about the exact scope of these things, but I wanted the courts to stay out of economic decision-making. The courts said that “freedom of association” does not include the right to strike.⁸ Well, all right, I agree that the labour movement should be left to its resources in the political arena, but I think the same should go for corporate marketing departments.

I am absolutely certain that none of us would have imagined a decision like the Supreme Court’s tobacco case.⁹ I am certain that when the drafters included “freedom of



SEAT OF POWER: “As Chief Justice Hughes of the U.S. Supreme Court said when he was a lowly politician, ‘The courts are bound by the Constitution, but the Constitution is whatever the courts say it is.’”
— Allan Blakeney PHOTO: PHILIPPE LANDREVILLE/SUPREME COURT OF CANADA

expression” as a fundamental freedom they did not mean commercial advertising for a harmful product. The Court purported to believe, in that case, that the cigarette companies advertised just to increase market share against each other, and not to increase the number of smokers. If I had been prime minister, I would have invoked the notwithstanding clause immediately.

GARETH MORLEY: What about other sections? What did you see the Charter as trying to accomplish?

ALLAN BLAKENEY: If you go through it, I think it fits with the limited vision of court

review I tried to sketch out. The purpose of the Charter ought to be to reinforce the democratic process, not to judge public policy against a standard of rights as intellectual propositions. Principles should not be divorced from who interprets them and decides on how they interact with other principles.

The Democratic Rights let the courts make sure that everyone got in on the political process. They decided that prisoners have the right to vote.¹⁰ Mobility Rights (section 6) and Official Language Rights (sections 16–23) are not something you will see in a lot of other constitutions: they were the core

of what Trudeau wanted politically out of a charter. The Legal Rights (sections 7–14) embody one of the functions of the judiciary I always thought was legitimate: supervising the police and criminal justice system. I may disagree with individual decisions, and I have no problem with Parliament using the notwithstanding clause if it thinks they got it wrong, but the courts have every right to be in the area.

Equality Rights raise the most difficult, and important, questions. I was in favour of section 15, including section 15(2) which allows for affirmative action. You don't want to say that governments should not differentiate. All policy distinguishes between people – discriminates in the positive sense.

When the drafters included “freedom of expression” as a fundamental freedom they did not mean commercial advertising for a harmful product. If I had been prime minister, I would have invoked the notwithstanding clause immediately. — Allan Blakeney

We hope that our taste in wine or books is discriminating. Discrimination in a bad sense does not mean treating people differently: it means treating people differently on grounds that cannot be defended. Most groups – lawyers, doctors, oil companies, organized labour, people who want private health insurance – can fight it out in the political process. Democratic politics, in my experience, is pretty receptive to the interests of organized minorities and, when it isn't, there is usually a reason.

Some minorities, though, are too unpopular or isolated to defend themselves in the political process. So, in that case, I think

it is good to have the courts ask whether the majority's grounds for treating those groups differently are “justified.” That is a value judgement, and it can be dangerous, but it needs to be done.

GARETH MORLEY: How should courts define the groups that need protection from the political process?

ALLAN BLAKENEY: I think it is important that they have regard to social, and economic, reality. There is no purely doctrinal basis. I think the Court has done a pretty good job reflecting what we were getting at in section 15.¹¹ They avoided either saying that oil companies are a protected minority, on the one hand, or making the section a dead letter on the other. What they have done is both within the contemplation of the parties to the 1981 constitutional agreement and of benefit to Canada.

GARETH MORLEY: Would protection of those with a minority sexual orientation be among the things the first ministers would have envisioned the courts doing back in 1981?

ALLAN BLAKENEY: I don't know. We didn't think much about homosexual rights back in 1981. But we knew the list of protected groups was not comprehensive. I don't have any problem with what the courts have done to promote equality between same-sex couples and others.

GARETH MORLEY: How did Aboriginal and treaty rights get into the Constitution?

ALLAN BLAKENEY: As you know, Aboriginal and treaty rights were not part of what the first ministers other than Lévesque agreed to in Ottawa in November 1981. I told the Aboriginal leaders that, if the deal could be opened up again, we would push

to include treaty and Aboriginal rights. I didn't think it was likely, but then the women's groups objected to the loss of a fairly symbolic provision that guaranteed all the rights in the Charter equally to men and women.¹² I thought that it might be a problem for affirmative action, and was generally unnecessary, but it was important to them symbolically, and they got the Charter opened up for discussion. So, we pushed to have treaty and Aboriginal rights in as well.

Alberta and British Columbia were worried about the implications, but Lougheed agreed if we put the word “existing” in. So we got what is now section 35.

All my lawyer instincts said we shouldn't do this – we should leave Aboriginal and treaty rights for another day. We did not know what section 35 meant, and, as a lawyer, I did not like having language when we did not know what it meant. But my politician instinct, which was dominant, was the opposite. I don't mean I thought that section 35 would be good for the government of Saskatchewan – it would cause every government trouble. But I felt that the condition of Aboriginal people in Canada was one of the worst things about our society, and we needed to give Aboriginal people some weapons against the political establishment, including us ...

GARETH MORLEY: How do your ideas differ from those of conservative critics of Charter review, like Professors Rainer Knopff and Ted Morton at the University of Calgary,¹⁴ or Stephen Harper?

ALLAN BLAKENEY: We fear different things. Conservative critics are fearful that judicial activism will substantially affect social decisions that should be up to the majority. My

fear is that judicial activism will substantially affect economic decisions. The courts have given conservatives reasons to be fearful: abortion,¹⁵ gay rights¹⁶ and so on. The courts have made a few decisions in the economic sphere. Not a lot, although if *Chaoulli* is the beginning of a trend, then there is a real problem.

I think the difference is that, in 1982, we consciously gave the courts the power to say something about social questions, at least social questions involving the interests of minorities, where minorities could not expect to get justice in the regular political process. We did not give them the power to adjudicate economic policy or social programs ...

GARETH MORLEY: Would you encourage politicians to run against the Court?

ALLAN BLAKENEY: If I were premier of Quebec, I would be on the campaign trail against the Court right now. I would argue, “How come Chief Justice McLachlin, from British Columbia, and Justice Major, from Alberta, decide what is best for the people of Quebec? Two of the judges who might know something about the situation – Justice Fish and Justice LeBel – were against striking down the National Assembly's law.”

Right now, the conventional wisdom is that our splendid parliamentary system, with a wise electorate, somehow elects only fools and knaves. Fools and knaves who appoint judges who are wise. Jean Chrétien is often portrayed as a fool and a knave, except somehow the judges – most of whom he appointed – are invested with superhuman wisdom. But these things come in waves. The day will come when the public will want more decision-making power back. ❖

FINN POSCHMANN: ... At the fall 1981 first ministers' conference Allan Blakeney said the notwithstanding clause would allow "Parliament and legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so well for so many centuries." Blakeney's identification of the tradeoff is reasonable as far as it goes. He does not make clear, however, whether he expects societal gains from a constitutionally entrenched Charter. In your view, what have been the gains? How are Canadians better off?

PATRICK MONAHAN: In the long haul, restraint of the executive is where the big gains have been found. An important example is restraint of police practices; without the Charter there would have been little leverage for Canadians seeking to ensure that police forces adhered to Western norms with respect to personal security, privacy or restrictions on search and seizure. Some of the earliest Charter cases were concerned with the manner in which evidence was secured, and Canadians today have a clearer view of their rights in matters such as search and seizure. We would not otherwise have had this clarity.

Another positive development is the discipline the Charter has placed on government decision-making. In other words, the peace, order and good governance directive is a shield for government choices that must be



Patrick Monahan

explicitly invoked – governments must explicitly justify restraints on Charter rights, and placing on government of the onus to do so is an important gain. That is what we saw with the *Chaoulli* decision, which we should discuss.

FINN POSCHMANN: ... The people who assembled the Charter in the early 1980s regarded many debates about the shape of society and proper modern law as settled. They perceived themselves as part of the triumphant progressive viewpoint; they felt that "we" knew better than the "they" of the past, and could right past wrongs through measures such as affirmative action. Hence Canada's Charter has 15(2), the section that permits discrimination on otherwise prohibited grounds if such discrimination is intended to achieve currently favoured goals – such as preferential hiring of people of race *x* or *y*. Now some of us may believe that stance unwise, even if it has broad approval, and certainly unwise to enshrine constitutionally, with the result that the stance becomes extraordinarily difficult to shift in law.

Contrast this experience with U.S. history, where such pivotal social questions remain open. The relevant example is *Bakke*, which placed limits on those who would pursue socially approved racial (reverse) discrimination, and subsequent debates over preferences in university admissions in California, Texas and elsewhere. Social pressure successfully reversed a trend toward burgeoning racial preferences and – this is the important thing – there was

energetic public debate that resulted in political choices being made (in California for example) that were subsequently sustained by courts. The courts themselves were not agents of social change, in these cases, notwithstanding complaints from U.S. politicians about judicial activism. Coming back to Canada, our constitutional authors saw such core social questions as settled, and the Supreme Court has subsequently seen itself as an agent of change that would implement the progressive vision of the future set in train by the legal elite of the day.

PATRICK MONAHAN: Again, as time goes by, choices do have to be made. The Charter is malleable and you have to remember that it was intentionally made so – and, accordingly, today we have more room for growth and room for changes to public understanding of things that are and are not in Charter.

Consider section 7's guarantee of life, liberty and security of the person. At the time [of the constitutional negotiations] it was not clear to everyone, including the Justice Minister of the day, what the section added to similar guarantees already contained in the Canadian Bill of Rights (the Diefenbaker Bill), guarantees which were largely limited to procedural rights. Yet by 1988 the Supreme Court had used section 7 to strike down section 251 of the Criminal Code, which had set limits and conditions on access to abortion. There you have an example of the courts giving life and current contextual meaning in a manner not contemplated at the time the Charter was framed.

FINN POSCHMANN: Indeed, the living tree imagery is ubiquitous. But why should the

Supreme Court see vested in itself a role in actively nurturing that tree? Why should it be a gardener of social change? The living tree image, a constantly changing world framework, is an inherently progressive image, and there is no mistaking the Court's belief in progress. Decisions cite Peter Hogg on progressive interpretation of the Charter, and the Chief Justice has been heard to speak as if the only constraint on judicial activism is not wanting to be too far ahead of the broad public in pursuing a progressive vision. Should not the Supreme Court, vital institution that it is, adopt a more sceptical view of progress, seeking instead to cement

The courts are active at the legal margins, and so they should be in defence of minorities. That is what the Charter is about. — Patrick Monahan

in place those rights that we collectively are quite certain to be enduring ones? It is, after all, an institution that derives its authority from custom and tradition, whose authority needs to be jealously guarded – for the Court to have the political capital in hand that permits it occasionally to render controversial decisions.

PATRICK MONAHAN: The courts are active at the legal margins, and so they should be in defence of minorities. That is what the Charter is about. Majoritarian or populist views are easily expressed through the political process and ultimately in legislatures. The problem is when those views, or their legal outcomes, begin to infringe on individual rights or what we suspect should legitimately be regarded as Charter rights. If we believe a

given right properly belongs on that list, we must rely on the Court ultimately to place it there, exactly because a populist majority might not be so inclined. From the point of view of the popular majority, however, the Court's actions will be perceived as pushing social boundaries. Again, however, being active at the legal margin is exactly what the Supreme Court must do; courts act against arbitrary actions, in defence of minority rights, exactly because that is their job.

Let me point out, however, that even conservative political scientists like Ted Morton of Alberta use Charter arguments, quite inconsistently in my view. I think you cannot have it both ways – if you want to get your way in court based on Charter arguments, you must accept that the court, if it agrees with you, will assert a position on the margins that is contrary to the one that legislatures, and by extension the population they represent, would otherwise adopt. Were things otherwise, you would not need to assert your case based on the Charter. Hence, in pursuit of Charter rights, we simply must accept ... that the Supreme Court will from time to time strike down things that elected legislatures have put forward ...

FINN POSCHMANN: ... Now, in the *Chaoulli* case the Supreme Court told Quebec that it must deliver particular health services in a manner sufficiently timely to suit the Court's pleasure. Here the Court seems to have extended rights talk well into the policy arena. One might say substantive due process has been extended not merely to the writing of law, but to the policy outcome. You must be uncomfortable with that.

PATRICK MONAHAN: I was surprised by the result, delighted and surprised by it because I certainly did not expect it. I am pleased that

it has reopened debate about governments' responsibilities to their citizens when they place restrictions on individuals' choices. That is the tradeoff or the onus the Charter places on governments. Provincial law has restricted access to private insurance, plainly a restraint on individuals' ordinary activities, and that restraint needs to be justified under the Charter.

Stanley Hartt and I laid out the section 7 arguments that underpinned the *Chaoulli* decision in a 2002 paper for the C.D. Howe Institute.¹⁷ In it we explained that when ill Canadians are prevented from using private insurance markets to arrange medically necessary services, at the same time as being denied timely access to public health services, there is a clear violation of section 7's guarantee of liberty and security of the person. Laws that limit private insurance are intended to protect a public health system so that it, in turn, can deliver needed health services. If it does not do so, if the public system fails to deliver the timely care needed to keep people alive and healthy, the law has failed in its stated purpose, and that is inconsistent with the principles of fundamental justice.

The best part of the *Chaoulli* result is that provinces cannot fail to respond. Either they find ways to provide appropriate health services, or they must permit individuals to find their own ways of doing so, but governments cannot have it both ways. Governments cannot prohibit one person from using his or her own resources to purchase necessary health services on the grounds that someone else cannot afford to do so, and then fail to provide the needed services to either. That would be an ideological pursuit, serving to treat people as objects rather than as living humans. ■

Notes

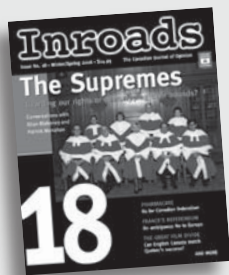
- ¹ From *Edwards v. A.G. of Canada*, [1930] A.C. 124 (P.C.) [*"Persons Case"*] (Women legally "persons" and therefore eligible to be senators, despite meaning of "person" in 1867).
- ² "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ..."
- ³ *Duke v. The Queen*, [1972] S.C.R. 917 (failure of police to provide breathalyser sample to accused not contrary to principles of fundamental justice).
- ⁴ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (imprisonment for absolute liability offence contrary to principles of fundamental justice).
- ⁵ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
- ⁶ "Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association ..."
- ⁷ *Ford v. Quebec*, [1988] 2 S.C.R. 712 (restrictions on language of commercial signs contrary to freedom of expression; predominance of French reasonable limit, but not exclusivity of French); *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (commercial advertising aimed at children protected by "freedom of expression, but restrictive law reasonable limit under section 1).
- ⁸ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.
- ⁹ *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 (restrictions on tobacco advertising not reasonable limit on freedom of expression).
- ¹⁰ *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 (blanket prohibition of voting for inmates in federal prisons unconstitutional); *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (prohibition of voting for inmates serving terms of two years or more also unconstitutional).
- ¹¹ "(1) Every individual is equal before and under the law and has the right to the equal

protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability ..."

The framework for section 15 is set out in *Law v. Canada*, [1999] 1 S.C.R. 497 (restrictions on Canada Pension Plan benefits for able-bodied surviving spouses under 45 not discriminatory).

- ¹² Section 28: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."
- ¹³ "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
- ¹⁴ F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).
- ¹⁵ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Criminal Code scheme governing abortion interferes with security of the person contrary to principles of fundamental justice).
- ¹⁶ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (failure to prohibit job discrimination based on sexual orientation unconstitutional); *M. v. H.*, [1999] 2 S.C.R. 3 (failure to provide same-sex partner with spousal support available to common-law partner unconstitutional); *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (proposed same-sex marriage law consistent with Constitution; Court declined to answer whether common law definition of marriage inconsistent with Constitution, as found by lower courts).
- ¹⁷ Stanley H. Hartt and Patrick J. Monahan, *The Charter and Health Care: Guaranteeing Timely Access to Health Care for Canadians*, C.D. Howe Institute Commentary, The Health Papers, no. 164, May 2002.

Arbitration in family law: Difficult choices



WINTER/SPRING 2006 The shari'a (Islamic law) controversy that erupted in Ontario, with major reverberations in Quebec, had its origin in late 2003 when an organization called the Islamic Institute of Civil Justice (IICJ) announced its intention to establish a "shari'a court" under the province's Arbitration Act. This announcement focused public attention on the Arbitration Act, its provisions for private arbitration in family law matters, the use of religious law within those provisions and – especially – the implications for women's rights if the religious law in question happens to be Islamic law. Michael Bryant, Ontario's Attorney General, and

Sandra Papatello, the Minister Responsible for Women's Issues, commissioned Marion Boyd, who had held both of those portfolios in Bob Rae's government in the early 1990s, to study the questions involved and make recommendations. In her report (*Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*), submitted in December 2004, Boyd recommended that the use of religious law in arbitration be continued, but that new safeguards be introduced to protect vulnerable individuals within religious communities.

Through the spring and summer of 2005, politicians, women's rights advocates, groups within the Islamic community (which was as divided as the rest of the province on this issue) and others took positions for and against the Boyd Report. The controversy spilled over into Quebec when Liberal member of the National Assembly Fatima Houda-Pepin, herself a secular Muslim, spearheaded a motion to oppose the establishment of shari'a courts in Quebec; the Assembly passed the motion unanimously.

In the midst of the controversy Inroads invited Boyd and Houda-Pepin to explain their positions; both accepted the invitation. We also invited a leading Muslim critic of the Boyd Report, Tarek Fatah of the Muslim Canadian Congress, to respond to Boyd, and Mohamed Nekili of the Canadian Islamic Congress, which strongly supported Boyd's position, to respond to Houda-Pepin.

Not long before Inroads went to press, Ontario Premier Dalton McGuinty defused the controversy by announcing that there would be no shari'a in Ontario. His announcement was later implemented in the Family Statute Law Amendment Act, 2006, which stipulated that family arbitrations must be "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction." Nevertheless, the underlying issues remain.

What follows is an excerpt from Marion Boyd's article, along with Tarek Fatah's reply.

Whatever the Ontario government does, it won't satisfy everybody

by Marion Boyd

THE 1991 ARBITRATION ACT AMENDMENTS in Ontario increased the capacity of the courts to enforce arbitration awards and limited the grounds on which the courts could intervene once arbitration had begun within the limits of the law. Religiously based arbitration has been available in many faith communities for years: Jews, Muslims and evangelical Christians, among others, have developed and delivered faith-based mediation and arbitration, with little or no controversy in the past. IICJ was proposing to use the Arbitration Act in the same manner as it is being used by countless other businesses and organizations in Ontario to arbitrate private disputes; it had no special status with respect to the government and the government had no role in its decision to use the existing law to provide its services.

The Arbitration Act in no way permits a "parallel legal system." However, the IICJ persists in describing its business as "the beginning of a shari'a court in Canada," thus fostering the apprehension of those who have experienced the harsh realities of shari'a-based law in Islamic countries

such as Iran or Afghanistan, where criminal punishments can be ordered in civil matters, the rights of individuals are subordinate to the religious dictates of the community and there is no separation between religious authority and the state. These opponents fear that the capacity to use Islamic law with respect to family law is merely the "thin edge of the wedge" and that those seeking a parallel legal system will continue to press for wider use of shari'a over time. It is apparent that many people have little understanding of the constitutional division of jurisdiction and the enshrinement of Charter rights that prohibit the development of such a regime in Canada without a wholesale change to our entire system of government and law, a change that would not be countenanced by Canadians.

The Arbitration Act applies only to civil matters that are subject to provincial jurisdiction, such as separation, property division or support of dependent children and spouses, and matters that are not specifically prohibited by the Act, as labour disputes are. Matters subject to federal jurisdiction,

such as criminal law or civil divorce, cannot be arbitrated. An arbitrator has no power to order the parties to do anything that the parties could not have agreed to do on their own and an arbitrator cannot order the parties to do something illegal under Canadian law (since the parties cannot lawfully agree to break the law). The courts retain their power to intervene in the best interests of children and to set aside arbitration decisions, as they can separation agreements, where the best interests of children are not honoured or where the decision is egregious. Judicial review with respect to fairness and equity in the process of arbitration cannot be waived by the parties.

Religiously based arbitration has been available in many faith communities for years: Jews, Muslims and evangelical Christians, among others, have developed and delivered faith-based mediation and arbitration, with little or no controversy in the past.

A wide range of dispute resolution methods provide alternatives to the adversarial win/lose forum of the court system. Many family matters are entirely resolved through negotiated separation agreements that may or may not come under the scrutiny of the court. Increasingly over the past 20 years successive reviews and research have recommended increased use of mediation and arbitration. For example, the Civil Justice Review in Ontario (1995) recommended that mediation should be required in all civil matters before resorting to the courts for decisions.

The studies point out a number of positive results of alternate dispute resolution:

the quicker time frame for resolution, the lower cost, the reduction of emotional stress, the specialized expertise that can be brought to bear on sensitive issues, and the sense of personal agency felt by the disputants. Those who do mediation and arbitration maintain that, when the parties are engaged in the process, they are more likely to respect the outcome, even if that outcome was not what was anticipated or desired. Those advocating religiously based mediation and arbitration argue that parties must have the right to choose to have their matters heard by those who understand their religious priorities, who respect their traditions and who speak their language (both literally and figuratively); the results have both legal and religious authority, thus encouraging compliance on both secular and religious grounds.

Opponents of alternate dispute resolution mechanisms believe passionately that those who are vulnerable, primarily women and children, are always at a disadvantage when private decision-making processes are used. They point to the prevalence of violence against women and children in all communities as an indication that women do not have equal access to power: a balance of power between parties is essential for mediation and arbitration to work as intended. These concerns are magnified when religiously based arbitration is proposed, particularly given the public pronouncements that have been made by some Muslim religious leaders about the role and position of women in society. The opponents portray women, and particularly Muslim women, as being unable to resist the pressure of religious leaders, their families and their communities, fearful that they will be ostracized by the only support system they have. In these circum-

stances, the essential element of choice in how to deal with family disputes becomes moot; the individual rights of women and their children could be subordinated to the rights of the community.

This is the crux of the problem. Canada is a multicultural society and the constant tension that must be addressed is between respect for the rights of minority groups and the protection of the rights of individuals within those groups. The most vocal opponents of arbitration, the National Association of Women and the Law (NAWL) and the Canadian Council of Muslim Women (CCMW), have urged the government to stop the use of arbitration altogether for family law matters ... NAWL and CCMW maintain that women's equity rights are best protected by streaming all family disputes through the public court system and that the government should focus its attention on improving court-based responses.

I undertook an extensive consultation in reviewing the Arbitration Act. I found that even those supporting the use of arbitration in family matters believe that the law must be changed to provide additional safeguards for vulnerable parties. At the time the Arbitration Act was passed in 1991, scrutiny of legislation and regulations to determine their impact on gender, race, religion, age and so on was in its infancy. Since then, public policy makers have developed a methodology to apply various lenses to proposed policies to determine whether they prejudice any particular vulnerable group and how these defects can be remedied. Had such a methodology been applied to the Arbitration Act in 1991, it would have been readily apparent that its provisions do have the potential to disadvantage vulnerable women and children. This is particularly so

if religious laws differ from Canadian laws with respect to such matters as support of dependent spouses and children and custody arrangements.

I was assured over and over again by Muslim leaders that, when Muslims live in a non-Islamic country, they are required to follow the law of the country where they reside. The problem is that the Arbitration Act currently does not require that family law matters be conducted in accordance with Ontario and Canadian law. Many of the 46 recommendations coming out of the Review focus on bringing arbitration agreements and decisions under the Ontario Family Law Act, so that they are subject to the same laws that cover separation, domiciliary and paternity agreements, and so that the same grounds to appeal to the court are available to those choosing arbitration.

The Review also recommends extensive changes in regulations with a view to protecting vulnerable people. Among other areas, these changes cover the making of arbitration agreements, the keeping of files, the provision of written decisions and reasons, the provision of full disclosure of which religious principles might be used, the availability of independent legal advice, and the screening of parties for a history of abuse. The Review recommends the regulation of both mediators and arbitrators and urges that a process for public monitoring of decisions be instituted so that any erosion of individual rights through the use of arbitration can be detected and remedied if seen. I concluded as a result of the Review that the key issue at stake in our multicultural democracy is how to protect individual choice and yet promote the full inclusion of communities within Ontario under our laws.

Marion Boyd just doesn't get it

by Tarek Fatah

THERE ARE MANY PLACES WHERE MARION Boyd demonstrates her preconceived notion about Canada's Muslim communities, but the one that stands out prominently is her remark, "I was assured over and over again by Muslim leaders that, when Muslims live in a non-Islamic country, they are required to follow the law of the country where they reside."

Whom did she consider a Muslim leader? How did she confer the title of "leader" on them and what barometer did she use to ascertain who was a "good" Muslim and who was a "bad" one? As one of many Muslims who presented our opposition to the introduction of shari'a into Canada's judicial system, I am witness to the fact that she dismissed any ideas from Muslims who did not fit her profile of Muslimness.

Here is what some prominent Muslims said about substituting for-profit, private-sector judges-for-hire using a law that did not exist for Ontario's Family Law Courts:

- Professor Omid Safi, who teaches Islamic studies at Colgate University in New York state, said, "The use of religious law as a substitute for laws created by Parliament, and the establishment of a multitier legal system – one for average Canadians and one for Muslim Canadians – is not

only unjust, but also detrimental to the well-being of all Canadian citizens."

- One of Islam's leading scholars in Europe, Professor Tariq Ramadan of the University of Fribourg in Switzerland, told a magazine there was no need for Canadian Muslims to set up their own shari'a courts, saying they are "not necessary." He said demanding such courts "is another example of lack of creativity" among Muslims.
- In May of this year, none other than Iranian human rights activist and Nobel Peace Prize winner Shirin Ebadi took a firm stand against the introduction of Islamic tribunals in Canada, warning that they open the door to potential human rights abuses.
- York University's Professor Taj Hashmi wrote, "The Government alone cannot stop the formation of the Sharia Board; civil society in general and liberal Muslims in particular should come forward to stop this vice, which is neither Islamic nor Canadian in character and spirit."
- Niaz Salimi, President of the Muslim Canadian Congress, wrote in the Toronto Star, "We believe that mosques, churches, temples and synagogues have an important

role to play in the community, but their role should be restricted to mediation and reconciliation, not interfering with the Canadian justice system and running a parallel private-sector judiciary with self-styled religious judges for hire."

- CBC Radio producer Natasha Fatah wrote in her regular cbc.ca column, "There is no formal system through which you can challenge religious clerics, the masters of the Shariah universe. And if you do challenge them, get ready to be called a blasphemer."

Did Marion Boyd pay any heed to these Muslims? Did she regard these Muslims as Muslims? Apparently not, or she would not have used the language she did.

Boyd's position that her report was a balanced approach that addressed the competing rights expressed by proponents and opponents alike and that it supports Ontario's policy position on equity in family law and multiculturalism does not withstand scrutiny. Proposing the continuing privatization of the judicial system does neither of the above. Equity in family law cannot be served by allowing self-appointed arbiters to market their services at \$200 an hour to vulnerable citizens. Multiculturalism does not get served by pushing an entire community into the hands of its priests, who would be answerable and accountable to no one.

If the Ontario government had implemented the Boyd Report, I believe the move would have further ghettoized the already marginalized Muslim community and would have played into the hands of racists who would like nothing better than to exclude Muslims from the mainstream.

Boyd refused to address the international geopolitical implications of her endorsement of shari'a. Had Premier McGuinty accepted the Boyd Report, it would have had a profound long-term impact not only on our society, but also across the Muslim world, where progressive and liberal men and women are fighting to keep shari'a out of the political system. In the words of Professor Safi,

We are alarmed at the prospects of repressive Muslim governments around the world pointing to Canada, and the implementation of shari'a within Canada, as a justification for their oppressive legal systems. This is not a comment on Islamic jurisprudence as a whole, but rather on the repressive interpretations of shari'a found in those countries. It is unrealistic to think that the ayatollahs of Iran or the proponents of Wahhabism in Saudi Arabia will not use this to promote the viability of their oppressive visions.

My position is not against religion. On the contrary, I stand for the constitutional guarantee of freedom of religion. However, freedom of religion does not mean that we dilute laws and strengthen the power of imams, priests and rabbis over their communities – and especially the most vulnerable within them.

In the end, Marion Boyd succumbed to the pressure of imams, priests and rabbis; Premier Dalton McGuinty didn't. For once a politician spoke with courage for all Ontarians and said that while he respects the desire of religious communities to use their faith-based laws to mediate and resolve problems, it is not the business of the state to validate or endorse any set of religious laws. ■

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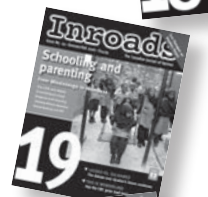
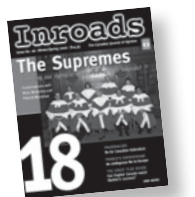
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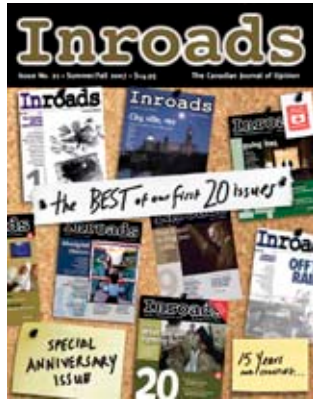
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