
**The Law Foundation of Newfoundland and Labrador**

# Legal Research Awards For Students of Memorial University

## 2013/2014 Awards

THE LAW FOUNDATION OF NEWFOUNDLAND AND LABRADOR

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# Preface

**Francis P. O'Brien, B.A., LL.B., LL.M.**
Adjunct Professor, Department of Political Science
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### *Introduction*

It is my great pleasure to have been invited to provide some introductory comments and context to this volume of the Law Foundation of Newfoundland and Labrador's Legal Research Awards for students at Memorial University.

The papers found in this volume, and in prior volumes published by the Law Foundation, showcase student legal research and writing excellence. It is indeed appropriate to highlight and share them with a broader audience in this format.

### *Two decades of excellence in Legal Research and Writing at Memorial*

As an Adjunct Professor and Instructor in three undergraduate Political Science courses at Memorial University, namely Law and Society, Canadian Constitutional Law and International Law, I have had the privilege of reading and grading over 2500 student legal research papers. As such, I have seen first-hand the academic curiosity and discovery, the diligent research and the disciplined process of writing, polishing and editing required of a student to produce an award-winning paper of this kind.

Since 1997 students in law courses throughout the University have tackled a broad spectrum of topical legal issues in their award-winning papers. Students from my own courses have been selected to receive approximately 40 of the Legal Research Awards, writing on disparate legal issues. To give some sense of the diversity of these papers, below is a small sampling of the wide range of topics canvassed through the years. These include:

*Mandatory Minimum Sentences; Genocide; Aboriginal Self-Government; Freedom of Expression; Canada's Assisted Human Reproduction Act; Terrorism, War, and International Criminal Law; Environmental Law and Liability; Expanding Aboriginal Rights; Right to Health Care in Canada; Constitutional Limits of Deterring Impaired Driving; Religion and the Canadian Charter; Reasonable Limits on Hate Speech; Maritime Piracy; The International Criminal Court; A Separate Canadian Military Justice System;, Section 1 Charter Interpretation; and The Constitutional Debate on Natural Resources in Newfoundland.*

A review of the papers in this current volume, dealing with such issues as *Judicial Activism* and the Charter, *Child and Family Services, Interjurisdictional Immunity in Constitutional Law*, a case commentary on the famous United States' Supreme Court decision in *Roe v. Wade*, the *Impact of our Judicial System upon Canadian Federalism*, and *Cultural Genocide in International Law* will attest to a similar diversity in the range of topics selected for consideration by the students, and a similar competence and dexterity in analyzing the legal issues in question.

In my experience, many of the Award-winning papers easily meet, and frequently surpass, the level of academic writing and maturity expected of students already in Law School. The papers are typically analytical, thoughtful, thesis-driven, based on sound legal research and written in an appropriate academic style. This is a credit to the students and a positive sign for our academic future.

### *Why the Awards Matter*

Students are genuinely motivated by the Awards and grateful for a forum in which their papers can be published. They are honored to even have their papers submitted for consideration, and understandably pleased to receive an Award. In some instances, the Award may even crystallize a student's decision to undertake further studies in law.

Past award winners have made significant contributions to the community outside the Legal Profession, for example in medicine, in academia, in business and in government.

Notably, the undergraduate law courses at Memorial and the Legal Research Awards have long been a catalyst for a career in the law. In the majority of classes I have instructed, year over year, at least one and more often numerous students have eventually gone on to Law School.

In the annual Bar Admission Course in Newfoundland and Labrador, it is common to see many students who took the undergraduate law courses at Memorial (many of whom were also recipients of the Legal Research Awards) and then continued their legal studies in Law Schools in other provinces before returning to Newfoundland and Labrador to launch their careers.

The roots of these careers in the law, then, are frequently found in those early law courses taken at Memorial and, in many cases, in the receipt of a Legal Research Award.

### *Excitement for the Future of Legal Education at Memorial*

There exists a genuine excitement among Memorial students about legal education, and this has been evident for many years. The law courses offered at Memorial have long been heavily subscribed and when students are canvassed as to why they have chosen to take a course dealing with law, a frequent reply is that they wish to go on to Law School.

This excitement and interest in the study of law among undergraduate students at Memorial is an intangible which I have seen throughout my years of teaching, and it is something which would be channeled and embraced by Memorial in building a truly excellent Law School to serve this province.

Knowing what great results Memorial students have achieved in the current context (without a Law School) with the University offering disparate law courses at the undergraduate level, and acknowledging the excellence produced by these Legal Research Awards winners in that same context since 1997, I am excited to imagine the future outcomes, for the University and the Province, at such time when our students may have the benefit of attaining a full and professional legal education at Memorial.

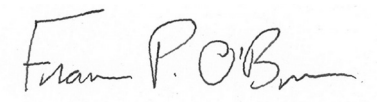
An innovative, intelligent and responsive Law School at Memorial, focused and clear in its role and responsibility, would provide an exceptional opportunity for the development of those students attending such a Law School, and in so doing positively impact and enhance the University itself and the greater Newfoundland and Labrador community.

Establishing a Law School which could have an immediate and meaningful impact on our Province would essentially be building on the established record of excellence which has been celebrated, for close to the past 20 years, by these Legal Research Awards.

### *Congratulations*

In conclusion I offer congratulations to this year's Legal Research Award winners for their excellent papers. I would also offer an acknowledgement of thanks to the Instructors at Memorial University whose teaching of law and mentorship in this area can provide the required inspiration, guidance and timely support for the excellent legal scholarship produced by our capable students.

Finally, the Law Foundation of Newfoundland and Labrador (including, notably, the Law Foundation Legal Research Awards Selection Committee) and Memorial University are both to be commended for instituting and continuing to confer these Awards over the past 19 years. The Legal Research Awards have now celebrated a generation of achievement in legal research and writing at Memorial, with so much more to come.



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Judy Casey, B.A., B.Ed., *Manager, Scholarships and Awards, Memorial University*

***The Law Foundation, established in February, 1980, provides grants to advance public understanding of the law and access to legal services.***

# The Law Foundation of Newfoundland and Labrador Legal Research Awards for Students of Memorial University

The Law Foundation of Newfoundland and Labrador annually offers up to seven Legal Research Awards valued at $750. (seven hundred and fifty dollars) each to students at Memorial University. The Awards are for outstanding research papers on one or more legal issues, or topics treated in a legal context, in a 2000 level course or beyond in any discipline at the undergraduate level and in any graduate course for students at the graduate level. A first year course is not eligible, with the sole exception of *LWSO 1000: Law, Democracy and Social Justice*. Preference will be given for one of the seven awards to an undergraduate student in their first year of studies, who is currently enrolled in, or has completed, the first year introductory course *LWSO 1000* at the time their paper in this course is submitted for consideration. The papers submitted by and with endorsement of course professor or lecturer will be judged initially by the Dean, Director, or Department Head who will make a recommendation to a special selection committee comprised of appointees of Memorial University and the Law Foundation. Undergraduate students will receive a minimum of 2 (two) and graduate students will receive 1 (one) or more of the 7 (seven) Awards available annually. In the case of undergraduate students the Awards will be made by the Senate Committee on Undergraduate Scholarships, Bursaries and Awards. In the case of graduate students the Awards will be made by the Dean, School of Graduate Studies. In both cases they will act upon the recommendation of the Foundation's selection committee. An additional $750. (seven hundred and fifty dollars) will be provided annually by the Law Foundation to Queen Elizabeth II Library for the purchase of research materials and resources. Total Awards $6,000.


Pictured at luncheon presentation at R. Gushue Hall, Memorial University of 2013/2014 Eighteenth Annual Legal Research Awards are:

***Standing (l-r)*** Dr. John A. Scott, Professor, Member, Selection Committee, F. Geoffrey Aylward, Q.C., Governor, Law Foundation and Member, Selection Committee, Aubrey L. Bonnell, Q.C., Chair, Board of Governors, Law Foundation, Dr. Ray Gosine, Vice-President (Research), *pro tempore*, Memorial University, The Hon. Raymond P. Whalen, Chief Justice, Supreme Court of Newfoundland and Labrador, Trial Division, The Hon. D. Mark Pike, Chief Judge, Provincial Court of Newfoundland and Labrador, and Alban G. Singleton, Deputy Chief, Royal Newfoundland Constabulary

***Seated (l-r):*** Justin Drover, Alex Marshall, Devin Drover and Jenna Hartigan, Awards recipients.

Christopher P. Curran, Q.C., Chair, and Justin S.C. Mellor, M.A., LL.M., are the other members of the Legal Research Awards Selection Committee.

# Law Foundation of Newfoundland and Labrador
# Legal Research Awards for Students of Memorial University

## 2013/2014 Awards

*(three semesters: Spring/Summer, Fall, 2013, Winter, 2014)*

Legal Research Paper Award Winning Submissions
*(The table of contents is in alphabetical order by Department, and similarly by student within Department; all five awards have equal standing)*

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## Table of Contents

# Case Commentary #2:
# *Roe v. Wade*

**Justin Drover**

Law and Society 1000: Law, Democracy and Social Justice

**Introduction:**

In 1973, The Supreme Court of the United States rendered a decision on *Roe v. Wade*, 410 U.S. 113, which voided Texas state abortion laws on the grounds that they were unconstitutional (*Roe v. Wade* (1973), p. 115 and 166). This decision is extremely important for a number of reasons. On a personal level, it granted the appellant and "'all other women' similarly situated" (*Roe v. Wade* (1973), p. 120) the right to legally seek an abortion without the prerequisite that a continuation of their pregnancy would be life-threatening. On a broader scale, this decision was precedent-setting in permitting abortion throughout the United States, under the constitution. Finally, this decision indicates a shift in social views in favour of a woman's right to choose whether to bear a child. Whether this decision is viewed as a good thing or not is a matter of opinion, but regardless of someone's social, political, ethical, moral, or religious beliefs, the effects of this case are significant.

There are many questions which are relevant to this case which are capable of sparking heated debates, even to this day. For this reason, the court attempted to put aside theology, politics, and other considerations in the weighing of the legal principles at hand (*Roe v. Wade* (1973), p. 116-117). Similarly, this case study will focus primarily on whether the court was correct in its ruling that Texas state abortion laws should be struck down as unconstitutional, and not on the difficult and related questions of morality, ethics and religion that the decision entails. The study shall proceed as follows: firstly, a brief explanation of the fact situation before the court. Secondly, an analysis of the process of the court's reasoning and eventual decision. Finally, a discussion of the effects this case has had and the social changes that it demonstrates.

**Section 1: The Fact Situation Before the Court**

**Sub-section 1: The Appellants**

Under the previous statute, women were prohibited from "procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life" (*Roe v. Wade* (1973) p. 114). The constitutionality of this statute was attacked by three parties. The first was a pregnant single woman referred to using the pseudonym Jane Roe. She claimed that the statutes infringed upon her right to personal privacy, and therefore conflicted with the First, Fourth, Fifth, Ninth and Fourteenth Amendments (*Roe v. Wade* (1973), p. 120). The second appellant was Dr. James Hallford, who claimed that the statutes were too vague for him to determine whether the circumstances of some of his patients qualified them as being able to legally receive an abortion and that the statutes also infringed upon his right to privacy under the doctor-patient confidentiality agreement and on his right to practice medicine, citing all of the same amendments as Jane Roe (*Roe v. Wade* (1973), p. 120-121). Finally, the statutes were attacked by Mr. and Mrs. John and Mary Doe, who alleged similar issues with the current statutes as Ms. Roe. Though they were not with child, they speculated that their inability to procure an abortion in the event that they needed one was having a "'detrimental effect upon [their] marital happiness'" (*Roe v. Wade* (1973), pp. 128).

The court would eventually dismiss the latter two complaints, but would uphold the appeal of Ms. Roe, creating the case law that pregnancy falls under the circumstances of being "'capable of repetition, yet evading review'" (*Roe v. Wade* (1973), p. 125). "Capable of repetition, yet evading review" means that since "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete", and "[p]regnancy often comes more than once to the same woman", it would be unfair for court proceedings to require that the plaintiff be pregnant for the duration of the case. Pregnancy was therefore deemed an exception to the usual requirement that a controversy must exist at the stage of review, and not just when legal action begins (*Roe v. Wade* (1973), p. 125). This case law then allowed consideration of the appellant's challenge to the constitutionality of the Texas abortion statute. This challenge in turn resulted in the eventual voiding of the Texas statute and the legalization of abortion by the United States Supreme Court on the grounds that the Texas statute as it currently existed violated the Due Process Clause of the Fourteenth Amendment.

Each of the appellants presented a slightly different issue to the court, and they will be treated in the reverse order from their introductions above, in order to progress from the least complicated to the most complicated issues.

**Sub-section 2: Determination of Legal Standing**

First, the Does' complaint was dismissed as being too speculative to constitute standing on which to challenge the

statutes. This is clear enough, since under the aforementioned legal principle, a conflict must exist at the time of the review (*Roe v. Wade* (1973), p. 125). Since any challenge the Does could present to the court was speculative in nature, it is clear that no present conflict existed and that the Does did not have the legal standing necessary to challenge the constitutionality of the Texas state abortion laws.

Second, Dr. Hallford, who was currently a defendant in two state cases related to the law in question, would need to challenge the law in state court, rather than federal court, because "absent bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the state is prosecuting him" (*Roe v. Wade* (1973), p.126). Federal court was not therefore the proper place for Dr. Hallford to seek declaratory relief. His attempt to draw a distinction between his situation as a current state defendant and his situation as a potential future defendant under the same charges did nothing to improve his legal standing, since the "potential" clause renders his grievance speculative, much like that of Mr. and Mrs. Doe. Dr. Hallford's appeal was therefore correctly dismissed.

It is in the case of Ms. Roe that the true controversy lies. Ms. Roe was clearly directly affected by the Texas state law at the time of her original appeal, since the law prevented her from procuring a legal abortion. While it would normally be necessary that a conflict also exist at the time of review, the court correctly deemed that Ms. Roe's argument should not be declared moot, because it was "'capable of repetition, yet evading review'". This means that Ms. Roe met all the necessary requirements of a plaintiff at the time of the court's decision.

Having established Ms. Roe's legal standing to challenge the current abortion laws, the question became whether Ms. Roe's claims offered sufficient reason to deem the Texas state abortion laws unconstitutional. Ms. Roe's primary argument was that the Texas statutes infringed upon her personal liberty to terminate her pregnancy, a right which she believed was offered by the Due Process Clause of the Fourteenth Amendment.

**Section 2: The Process of the Decision**

**Sub-Section 1: Potential Reasons to Support Anti-abortion Legislation**

Before determining whether Ms. Roe's challenge gave sufficient reason to overturn the previously existing laws, the court reviewed the stated historical reasons for such laws to exist. These are three-fold: First, these laws have been viewed as a product of Victorian society, which sought to avoid sexual activity outside of wedlock (*Roe v. Wade* (1973), p. 148). Second, these laws were promoted in the interest of promoting the health and safety of mothers by preventing them from undergoing a dangerous procedure (*Roe v. Wade* (1973), p. 148-149). Finally, these laws promote the interest of the state in protecting the life of the unborn (*Roe v. Wade* (1973), p. 150). Each of these reasons shall now be dealt with individually.

The first historical reason for the existence of anti-abortion laws is the prevention of promiscuity. However, the values of Victorian society do not necessarily match those of today's society, and the court was of course correct in quickly dismissing this reason. The prevention of promiscuity is seldom considered a valid interest of the state, and as the appellants correctly pointed out, there was no distinction in the Texas state law between married and unmarried women, meaning that the prevention of promiscuity, even if it were a valid state interest, would not justify the extent of the law that existed at the time (*Roe v. Wade* (1973), p.148).

The second historical reason for the existence of anti-abortion laws is the protection of the mother's well-being by preventing her from submitting to a dangerous procedure. However, as the courts correctly pointed out, medical technology had advanced by that time to the extent that abortion could now be undertaken in the first trimester with as little or less risk to the mother than would exist in the process of natural childbirth (*Roe v. Wade* (1973), p. 149). In accordance with this change, it was determined that the state could still regulate abortion to ensure the safety of those involved, but that the protection of the mother's well-being was no longer a compelling reason to prohibit abortion (*Roe v. Wade* (1973), p. 149-150). What the ideal extent of this regulation is shall be examined later, but for now it is sufficient to establish that the court was correct in saying that the protection of the mother did not offer a valid defence for the Texas state law as it existed at the time.

The final reason proposed in defence of anti-abortion legislation is the state's interest in protecting the life, or at least the potentiality of life, embodied in the fetus (*Roe v. Wade* (1973), p. 150). This is a much stronger argument than the previous two, and the question of whether this interest is enough to maintain the law in its then-current form is one of the main points of the case. Whether life is deemed to begin at live birth or at some point before then is highly significant, but it is not a point on which the case necessarily lives or dies. In the event that life is definitely found to begin at conception, the state's interest in protecting that child's life could potentially be argued to override all other considerations save the mother's own life. Otherwise, the court would still have an interest in defending the potentiality of human life, but this interest would not exert as much of an influence as would the defence of currently existing human life (*Roe v. Wade* (1973), p. 150). Clearly, the next logical step in the court's decision is the determination of whether a life should be deemed to begin at conception, and

therefore whether a fetus should have the same guaranteed rights as a "person" in the normal usage of the word.

**Sub-section 2: Historical Considerations Related to Abortion**

The court was very thorough in its examination of the history of laws and attitudes related to abortion. They viewed the practices of ancient cultures, the Hippocratic Oath, the common law, the English statutory law, the American law, the American Medical Association, the American Public Health Association, and the American Bar association on the matter of abortion.

Through its review, the court determined that abortion was a topic on which opinions varied at least as far back as ancient Rome, Greece, and Persia. However, it was determined that in general, ancient religion did not prohibit abortion, and abortion was largely legal in ancient cultures (*Roe v. Wade* (1973), p. 130).

It was also determined that the Hippocratic Oath (a widely respected medical Oath) bars giving a woman "'an abortive remedy'" (*Roe v. Wade* (1973), p. 131). However, this Oath did not achieve nearly the same degree of popularity in ancient times as it has today, and cannot therefore be considered an accurate representation of ancient opinion, nor should it be considered an absolute medical standard to which one must adhere (*Roe v. Wade* (1973), p. 131-132).

It was clearly found that abortion of a fetus that was not yet quick was not an offense under the common law (*Roe v. Wade* (1973), p. 132), and it is a matter of some dispute as to whether the abortion of a quick fetus "was ever firmly established as a common law crime" (*Roe v. Wade* (1973), p. 136). Regardless, since it could not be clearly shown whether the common law deemed abortion a crime, the court moved on to other historical research.

The English statutory law penalized abortion whether the fetus was "quick" (meaning that the mother could feel the fetus's movement) or not, but the abortion of a fetus that was not quick constituted a lesser offence (*Roe v. Wade* (1973), p. 136). Allowances were made for cases in which the mother was at risk of injury or death, in which there was substantial risk of the child being severely handicapped, or of the mother or her other children suffering significant physical, mental, or psychological injury (*Roe v. Wade* (1973), p. 137-138).

Under American law, there was a similar distinction to that of English statutory law between a fetus which was quick and one which was not. Many states also held similar provisions for situations in which there was a risk to the well-being of the mother (*Roe v. Wade* (1973), p. 138). Penalties for illegal abortion did not increase until about the turn of the twentieth century (*Roe v. Wade* (1973), p. 139). This is significant because it means that at the time of the constitution's enactment, abortion laws were less strict than they were at the time of this case. The logical inference is that it was not the intention of the makers of the constitution to include a fetus under the heading of "person" (*Roe v. Wade* (1973), p. 140).

The American Medical Association, American Public Health Association and American Bar Associations had very different views regarding the lawfulness and morality of abortion to various degrees, but they all at least agreed that in the event of risk to the mother, rape, or risk of severe handicap to the child, and provided that appropriate regulations for the safety of the operation were in place, abortion should be allowed (*Roe v. Wade* (1973), p. 142-143, 145, and 146).

Overall, though there were frequent qualifications regarding the safety of the operation, the professional opinion of licensed physicians that an operation was advisable, and the existence of exceptional circumstances, the prevailing opinion throughout history seems to be that abortion should be allowed if it can be safely undertaken. These opinions were factored into the decision of the court.

**Sub-section 3: When Does Life Begin, and Is a Fetus a "Person"?**

The court reviewed the Constitution, and found that no definition was given for the word "person", and that nearly all uses to the word made sense only if one was referring to someone who had already been born. No indication appears to have been given that the word "person" should be used to refer to a fetus. Further, "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment" (*Roe v. Wade* (1973), p. 157). Finally, as was stated above, the laws in place at the time of the Constitution's enactment were less strict than those in place at the time of *Roe v. Wade* (*Roe v. Wade,* (1973), p. 140). The fact that the enactment of the Constitution did not nullify the previously existing state laws (which were more lenient regarding abortion) implies that the drafters of the Constitution did not intend for the right to life guaranteed therein to be extended to fetuses. Presumably, this is because the opinion at the time of the Constitution's enactment was that a fetus was not a person. Considering that the court did not deem a fetus to be a person, the court was correct in not extending the right to life to apply to fetuses, because the right to life is only applicable to individuals that are recognized as "persons".

**Sub-section 4: Dealing with the Appellant's Claim**

Having essentially dealt with each of the reasons given in support of the Texas statutes, it is now appropriate to turn

to the argument made against them. The primary claim made by Ms. Roe was that the state abortion laws infringed upon her personal right to privacy, as granted by the Fourteenth Amendment (*Roe v. Wade* (1973), p. 129). The court agreed that such a right was implicit in the rights to personal privacy and liberty, and was able to cite a great deal of precedent confirming a right to personal privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments, as well as the Bill of Rights (*Roe v. Wade* (1973), p. 152-153).

The two questions that must now be asked are whether the right to privacy encompasses the right to an abortion, and whether this alleged right is enough to overturn the Texas state law.

A degree of conflict arises in response to the first question, since some would question the application of the right to privacy to abortion legislation, given that an abortion is not a "private" matter in the usual meaning of the word and that the "privacy" determined by the court has little to do with the Fourth Amendment's freedom from search and seizure, which was cited by the court in its establishment of the existence of a right to privacy (*Roe v. Wade* (1973), p. 172). However, it would seem that the "privacy" protected here is not the actual medical process of abortion, which is not necessarily private, but rather the choice to have an abortion, which is inherently private. Further, while the right of privacy found here may seem unrelated to freedom from search and seizure, it is rather apparent that the decision of what to do with one's own body is necessarily more private than any matter related to the searching or seizing of one's property. Freedom from state intervention in such a private matter as the decision to have an abortion flows logically from freedom from search and seizure, because the decision to have an abortion is even more of an intensely private matter. For this reason, it was correctly decided by the court that the right to personal privacy does encompass the right to have an abortion.

In response to the second question, the three reasons given in support of anti-abortion legislation were the prevention of promiscuity, the protection of the well-being of the mother, and the protection of the life, or potentiality thereof, embodied in the fetus (*Roe v. Wade* (1973), p. 148-150). The first two of these have been wholly struck down, and the third has been amended to merely the protection of the potentiality of life, given that a fetus has not been shown to constitute a "person" in the full sense of the word. While the state still has a valid interest in protecting merely the potentiality of life, this interest alone is not enough to hold up the anti-abortion statutes in the face of their deprivation of Ms. Roe's constitutionally protected rights (*Roe v. Wade* (1973), p. 162).

**Sub-section 5: Decision on the Validity of Texas State Law**

For these reasons, Ms. Roe's rights were correctly deemed to encompass the right to an abortion, and to take precedence over the state's interest in the potentiality of life. Therefore, the court was correct in its ruling that Ms. Roe was entitled to an abortion and that the Texas statutes as they existed should be struck down. At this point, the only further consideration should be the regulations to be imposed upon abortion.

**Sub-section 6: Reasonable Limitations of Rights**

Given that the state still has an interest in protecting the health of the mother in the event of an abortion, and an interest in protecting the potentiality of life, it is both reasonable and necessary that certain limitations be placed on the right to an abortion such that it is not exploited. Since these interests become more of a concern as the woman comes closer to term (*Roe v. Wade* (1973), p. 114) (the fetus comes closer to being born and attaining the status of "person", and any potential abortive operation becomes increasingly dangerous for the mother), the court decided to partition the stages of abortion law in accordance with the stages of pregnancy. This is entirely reasonable and justified.

The court decided that since "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (*Roe v. Wade* (1973), p. 163), it was not the place of the state to interfere in the process of any potential abortions prior to approximately the end of the first trimester. This, again, is because at this point the state's interest in protecting the life of the mother has not become "compelling". Similarly, the state's interest in protecting the potentiality of life is also not "compelling", because the potential child would be little more than an embryo at this stage. Therefore, the attending physician and his patient may decide together whether an abortion is advisable and may carry it out if they so choose without state regulation (*Roe v. Wade* (1973), p. 163).

During the second trimester, the state's interest in the protection of maternal health becomes compelling, and various regulations may come into effect, provided that they are rationally related to the upholding of the state's interest. To this end, the court permitted state regulation in terms of the qualifications and licencing of the physician who would carry out the abortion, and regulation as to whether abortions should be required to take place in hospitals beyond the first trimester, or whether clinics and other non-hospital medical facilities could be licenced to carry out abortions (*Roe v. Wade* (1973), p. 163). These regulations seem entirely in accordance with the relevant state interest of protecting maternal health.

The other state interest – that of protecting the potentiality of life – becomes compelling at the point where the fetus becomes viable, which is at approximately 24-28 weeks. At this point, the state, in its protection of pre-natal life, rather than preventing the mother from aborting something which is essentially just an extension of her body, would instead be protecting the life of a being that is capable of being born alive. For this reason, the court deemed that in accordance with the state's interest in protecting potential life, once the fetus becomes viable, the state may (but does not have to) prohibit abortions up to, but not including cases in which the mother's life would be at risk (*Roe v. Wade* (1973), p. 163-164). This seems to give the state an appropriate degree of control, because obviously they could not force the mother to risk her life, but in all other circumstances, the state could, if it chose to enact such a law, ensure that a fetus capable of being born alive is given the chance to do so. This strikes a delicate balance between the rights of the mother and the state's interest in protecting potential life.

These regulations appear to be relatively well balanced and effective in upholding both a woman's right to choose what to do with her body and the state's interest in protecting the woman's life, as well as the potential for life she carries within her. However, there may be room for improvement in regards to the regulation of abortion in the first trimester. Justice Renquist, in his dissenting opinion, stated that "the court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under [the standard that deprivations of rights are sometimes permissible if they are found to be rationally related to a valid state interest]" (*Roe v. Wade* (1973), p.173). This raises a good point, and suggests that even if abortion is considered safer (when conducted properly) during the first trimester than normal childbirth, this should not prevent the state from regulating the process during the first trimester. Even though the state's interest in protecting pre-natal life is not compelling until viability, one could certainly argue that the state's interest in protecting maternal health should always be compelling. The fact that properly conducted abortions are less dangerous than natural childbirth should not prevent abortions from being properly regulated, because an absence of such regulation could allow for improperly conducted abortions, which would in turn place the mother in danger. It could be recommended that more regulations should be enforced during the first trimester. For example, there could be similar licencing requirements for clinics and physicians to those of the second trimester, but without the possibility that the state could mandate that all abortions take place in hospitals. These additions could improve the decision of the court by avoiding any risk of exploitation of the lack of state regulations during the first trimester.

**Sub-section 7: Additional Concerns Related to the Dissent of Justice Renquist**

In his dissenting opinion, Justice Renquist raised several issues which will now be reviewed. He proposed that Ms. Roe should not have legal standing to challenge the abortion laws that regulated any specific trimester because the fact situation before the court simply stated that Ms. Roe was pregnant, but did not include mention of any specific trimester (*Roe v. Wade* (1973), p.171). Justice Renquist also proposed that since there were several anti-abortion statutes at the time of the enactment of the Constitution, this implies that it was not the intent of the drafters of the Constitution that it be applied so as to limit the influence of the state on the matter of abortion (*Roe v. Wade* (1973), p.174-177). Finally, Justice Renquist suggested that the anti-abortion statutes of Texas should not be completely struck down, since the court had agreed that such legislation was permissible to the same extent as it was here seen, but on the condition that the fetus was already viable. Taking this into consideration, Justice Renquist would advise that the Texas state law be found unconstitutional as applied in this instance, but not struck down "in toto" (*Roe v. Wade* (1973), p.177-178).

The first issue that Justice Renquist has brought to light can be dealt with rather easily. The suggestion that legal standing to challenge the constitutionality of anti-abortion laws governing the first trimester could only be granted to a plaintiff who was herself in her first trimester (*Roe v. Wade* (1973), p.171) would fall under the court's earlier proclamation that pregnancy (and by extension any specific trimester therein) was "'capable of repetition, yet evading review'". Furthermore, Ms. Roe did not challenge the statutes governing any specific trimester, but anti-abortion legislation as a whole. The division of pregnancy according to trimester was a simplification device employed by the court, and should have no effect on the legal standing of Ms. Roe.

Justice Renquist's second alleged issue with the ruling of the court was that the existence of abortion legislation both before and after the enactment of the Fourteenth Amendment implied that it was not the intention of the drafters of the Amendment that it be applied in this way to anti-abortion legislation (*Roe v. Wade* (1973), p.174-177). While this is a reasonable claim, it is also important to consider the medical advancements since the enactment of the Fourteenth Amendment. While it may not have originally been the intention of the Amendment to invalidate these statutes, the state interest in protecting the life of the mother was one of the main reasons why such statutes were enacted. Given that abortions can now be undertaken much more safely than at the time of the enactment of the Fourteenth Amendment, there are more factors to consider than just its original intentions. For this reason it cannot be said that the original intention of the Fourteenth

Amendment should prevent the declaration that Texas state abortion laws were unconstitutional.

Finally, Justice Renquist's proposition that the anti-abortion statutes of Texas be deemed unconstitutional as applied in this instance, but not struck down completely (*Roe v. Wade* (1973), p.177-178), makes a very strong point. It seems counter-productive on the part of the court to strike down Texas state law as unconstitutional and then declare that the state can impose the exact same restrictions, but only under certain circumstances. It may have been more efficient to allow the law to stand and only be applicable in certain circumstances. However, whether it would be easier to amend the current law and divide it based on the stages of pregnancy or to strike the current law down and replace it with a new set of laws (even if the law relating to a viable fetus happened to impose the exact same restrictions as the previous law) is debateable.

**Sub-section 8: Conclusions on the Court's Process and Analysis**

Overall, it seems that the court was correct in its analysis of the fact situation, in determining the legal standing of all parties involved, and in reducing the state's valid interests to the protection of the mother and the protection of the potentiality of life (*Roe v. Wade* (1973), p.162-163). The court correctly ruled that the mother's right to privacy extends to the decision of whether to bear a child and was therefore correct in asserting that Ms. Roe and all others of her class have the right to an abortion (*Roe v. Wade* (1973), p.153). The court correctly deemed that this right was not absolute and placed limitations on a woman's right to an abortion, limitations which increase in their restrictiveness as the state's interests become compelling – that is, as the mother approaches term (*Roe v. Wade* (1973), p.162-163). However, one possible amendment to these restrictions could be to increase regulations in the first trimester on the grounds that this will ensure that abortions are conducted safely and the state is able to defend its interests in the protection of maternal well-being. Nevertheless, the court is correct at the heart of its decision, and has been reasonable in its limitations of rights. With the possible exception of the lack of regulation of the first trimester, the court's decision is lawful, logical and fair.

**Section 3: The Ramifications of the Decision**

Having established the veracity of the court's decision, the final remaining issue is a discussion of this case's effect on the political-social environment. This case is extremely important in that it changes abortion from a matter of majority rule to one of minority rights, demonstrates and enforces a change in social values and creates precedent for the nation-wide legalization of abortion under the Constitution.

Democracy is majority rule with minority rights (Jefferson, 1801). On a technical level, this case changes the issue of abortion from one which is decided based on state legislation i.e. "majority rule" to one which gives priority to "minority rights". As such, this case has affected the treatment of abortion within democracy. In doing so, this case directly influences the role that democracy is able to play in the lives of women, and prevents them from being subject to the wills of others in this private matter. The court, in expanding women's rights to include the right to an abortion and protecting that right under substantive Due Process, has essentially made the right to an abortion immune to review by the democratic process, because regardless of popular opinion (majority rule), abortion remains protected as a minority right (*Roe v. Wade* (1973), p.114).

This case also demonstrates changing social values. During the Victorian era, the state was able to legislate under the interest of "discourage[ing] illicit sexual conduct" (*Roe v. Wade* (1973), p.148). The fact that this is not recognized as a valid state interest in this case marks acknowledgment of the fact that it is not the place of the state to interfere in such private matters. Conversely, in having extended a woman's rights of liberty and privacy to the choice of whether or not to have an abortion, the Supreme Court of the United States has acknowledged a shift in social views in favour of greater individual freedoms. Moreover, the court has not only acknowledged these changes, but has defended and anchored them.

Some have questioned whether the court's finding in favour of Ms. Roe should have been grounded in promoting social equality rather than in the right to privacy (Balkin, 2007, p. 844). The logic of this argument is as follows: even laying aside the fact that it is a woman who must endure the pregnancy itself, "[t]he obligations of parenthood and child care continue to fall far more heavily on women than men" (Balkin, 2007, p. 851). This means that restrictions on abortion would affect women much more so than men. The fact that a woman could essentially be forced against her will to take on the role of a mother and to greatly alter her lifestyle in order to accommodate such a role would force women into a subordinate role in society (Balkin, 2007, pp. 852). Given that it would be much less likely for a man to be similarly bound by the responsibilities of parenthood against his will, it would seem that in order to create equality between sexes it would be necessary that women be given the right to choose whether to become a parent. To do otherwise would be "a form of class legislation prohibited by the Fourteenth Amendment" (Balkin, 2007, p. 852).

It is certainly true that a similar result could have been reached by viewing *Roe v. Wade* as a case about social equality rather than considering it as a question of privacy rights. It is most likely that the reason the case was *not* treat-

ed on the basis of social equality is because as Justice Blackmun agreed, it is quite unlikely that the case "could have been decided on sex equality grounds in 1973… [t]here simply were not enough votes for that proposition" (Balkin, 2007, p. 854-855). The fact that there were not enough votes on the court to support the claim that Roe. v. Wade should be treated as an issue of social equality shows why the court did not choice to view it in such a way: at the time, it is unlikely that they would have come to the same conclusion as they did in viewing it as a matter of individual privacy. This is a question more relevant today than in 1973.

Finally, in having based the right to an abortion on constitutional rights of privacy and liberty, the court has provided a basis on which to legalize abortion throughout the United States. This ruling does not just rule the Texas state abortion law unconstitutional; it prevents any of the other states from adopting a law preventing the abortion of a non-viable fetus (*Roe v. Wade* (1973), p. 155, 163). In practice, this legalizes abortion throughout the U.S. on constitutional grounds. It is clear why this would be important to society: it guarantees women more rights and contributes to liberalism and individualism. It also provides an alternative option for prospective mothers, which is particularly important in the cases of rape, teenage pregnancy, and pregnancies with significant risks to the mother, or where the child would suffer from a severe disorder. These laws continue to this day, as do their effects in shaping society.

Looking to the future, the questions raised by *Roe v. Wade* become even more unclear. As new genetic technologies and techniques are developed, it will become necessary to determine the extent to which the right to decide whether and how to beget children extends. These rights could potentially be extended to include the decision to clone oneself, or to genetically modify a child such that they display only "desirable" traits. Whether such decisions should be guaranteed under the same logic as was used in this case depends on how one interprets this case, and it may become very important in the future to determine the extent of a parent's reproductive rights as they pertain to decisions about the genetic make-up of their child (Balkin, 2007, p. 856). Clearly, the effects of *Roe v. Wade* are not limited to the past, or even to the present. In the future, the rights established in this case - and the limitations thereof - will become even more important than they are currently. ■

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# *A.C. v. Manitoba* (Director of Child and Family Services) A Case Commentary

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The Supreme Court of Canada decision of *A.C. v. Manitoba* (*Director of Child and Family Services*), [2009] 2 S.C.R. 181 considered various aspects of constitutional law, namely freedom of religion; the right to life, liberty and security of the person; and equality rights. The issues were complex and controversial. The core issue was a fourteen year old Jehovah's Witness could legally refuse a potentially lifesaving blood transfusion on the basis of religion.

The Supreme Court's decision was carefully scripted and attempted to clarify the law in a way that would protect other Canadian adolescents who might find themselves in similar predicaments. The decision was morally well founded. It confirmed the power of the Court right under the *Manitoba Child and Family Services Act* to make the final decision for persons under the age of 16 years.

## I. The Facts

In April of 2006, a 14 year and 10 month old girl (A.C.) was admitted to a Winnipeg hospital, suffering from Crohn's disease.[1] She had previously signed an "advance medical directive" which instructed the hospital staff that she was not to be given a blood transfusion "under any circumstances."[2] This request was in accordance with her religious beliefs as a Jehovah's Witness. Her attending physician, Dr. Lipnowski, ordered a psychiatric assessment to determine if she had the "capability of understanding death."[3] Three hospital psychiatrists were present during the assessment, as well as her parents. The psychiatrists report concluded that A.C. had "no psychiatric illness at present" and that she understood "the reasons why a transfusion may be recommended, and the consequences of refusing to have a transfusion."[4]

The psychiatrists' assessment was questionable. The interview was only105 minutes. During the assessment itself, the parents were stating that "A.C. treasures her relationship with God and does not want to jeopardize it, that she understands her disease and what is happening."[5] It is difficult to believe that in less than two hours, with her parents in the room (not legal counsel on her behalf), that the psychiatrists could determine that A.C. had the mental competence to refuse potential life saving treatment.

A few days after the assessment A.C.'s condition began to rapidly deteriorate. The doctors were convinced that a blood transfusion was necessary; however, the patient continued to remain adamantly opposed to the procedure.[6] A.C. was apprehended by the Director of Child and Family Services "as a child in need of protection under the Manitoba *Child and Family Services Act*"(the *Act* or CFSA).[7] The Director requested a court order under s. 25(8) and s. 25(9) of the *Act* which would authorize A.C's doctors to "administer blood transfusions to A.C. as deemed necessary."[8] Sections 25(8) and 25(9) of the Manitoba *Child and Family Services Act* are noted below:

> *25(8) Subject to subsection (9), upon completion of a hearing, the court may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child.*
>
> *25(9) The court shall not make an order under subsection (8) with respect to a child who is 16 years of age or older without the child's consent unless the court is satisfied that the child is unable*
>
> *(a) to understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or*
> *(b) to appreciate the reasonably foreseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment.*

Kaufman J. heard the emergency application. A.C.'s doctor told the Court that a blood transfusion was necessary. He said that if she did not receive one as soon as possible she could "have seizures [due to a decrease of oxygen levels in her brain] and other manifestations of the brain that will contribute to a faster demise or death."[9] Kaufman J. ruled that A.C. had "capacity" to make medical decisions but thought that her capacity was irrelevant since under the *Act* there were "no legislative restrictions"[10] on the court's authority to order medical treatment in the child's 'best interests' under s.25(8). He therefore granted the treatment order and as a result, A.C. made a full recovery.

While the medical issues of this case were behind, the legal issues had just begun. A.C. and her parents appealed Kaufman J.'s decision to the Manitoba Court of Appeal. They argued that the *Child and Family Services Act* was

unconstitutional in three ways:[11] 1) that it violated A.C.'s religious freedom under section 2(a) of the *Canadian Charter of Rights and Freedoms* (the *Charter*); 2) that it violated her Charter right to life, liberty and security under section 7; and 3) that it violated her equality rights under section 15(1) of the *Charter*. Despite its mootness relating to the medical issues, the Court of Appeal decided to use its discretion and hear the case since it was clearly a matter of national concern (the medical self-determination rights of Manitoba and Canadian minors).

The relevant *Charter* sections are reproduced below:

2. *Everyone has the following fundamental freedoms: (a) freedom of conscience and religion;*

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

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

**II. At the Manitoba Court of Appeal**

In the unanimous opinion of the Court, Justice Steel confirmed that the Justices "would deal with the interpretation of the legislation on the same basis as the motions judge [Kaufman J.]; that is, that s. 25(8) was based on the best interests test even if the minor had capacity. Therefore, this would not be a decision as to whether the minor in question, A.C., has capacity in this particular case." The Court of Appeal interpreted the statute as empowering the Court to "make treatment decisions for those under 16, with or without capacity, based on a 'best interests' test." The Court of Appeal believed that a child's wishes and capacity are relevant to the analysis, but were not determinative.[13] The Court then had to determine whether sections 25(8) and 25(9) of the Act were constitutional. The constitutional analysis commenced with s.7 of the *Charter*.

*s.7 Analysis*

In order to determine whether the *Act* violated A.C.'s section 7 *Charter* rights the Court needed to identify the "competing interests at stake."[14] Those interests were enumerated as follows:

1. The interest an adolescent has in his or her personal autonomy; and on the other hand
2. The state's interest in the protection of children and the sanctity of life.

Justice Steel, speaking for the panel, concluded that there were four (4) reasons why the age of 16, stipulated in the *Act*, was not arbitrary:[15]

1. A fixed age has been chosen as the dividing line for other purposes regarding children and fundamental life choices.
2. The requirement for an individual assessment in the case of a child who is under 16 may not adequately protect children in an emergency situation where a court must consider a wide variety of variables in a time-limited situation.
3. The level for intervention is life threatening.
4. The determination is made within the context of a best interests test (where this test has been used historically and is internationally recognized).

Accordingly, the Court concluded that the *Act* did not violate section 7.

***s.2(a) Analysis***

The Court found that the *Act* breached A.C.'s s. 2(a) right to religious freedom.[16] The Court then had to determine whether this breach could be saved under s.1 of the *Charter* as a law that could be 'demonstrably justified in a free and democratic society.' The Court used the Oakes test in determining whether the *Act* could be justified under s.1. The Oakes test was established in the 1986 case of *R v. Oakes*.[17] It sets out the criteria that must be satisfied for a law to be deemed constitutional under s.1 when it has been determined by the court to have breached another section of the *Charter*:[18]

> *First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*

The Court stated that the objective of the statute; 'protecting the life and health of children', was clearly 'pressing and substantial'. Further, both the 'rational connection' and 'minimal impairment' aspects of the Oakes test were also met "for substantially the same reasons that led the court to conclude that the [legislative] scheme did not violate s.7."[19] Therefore, the *Act* was saved under s.1.

***s.15(1) analysis***

Lastly, the Court of Appeal found that the *Act* did not breach s.15. They reasoned there was no 'arbitrary marginalization' of children under 16 since the legislation "attempts to respond to the dependency and reduced maturity of children as a group."[20]

The *Act* was therefore found to be constitutional. A.C. and her parents then appealed to the Supreme Court of Canada and were granted leave.

**III. At the Supreme Court of Canada**

The issues before the Supreme Court of Canada (SCC) were fused into a powerful and controversial intersection of morality, religion and the law. The decision was split (4-2-1) between a majority (comprised of Abella, LeBel, Deschamps and Charron, JJ.), concurring (McLachlin C.J.C., and Rothstein, J.) and dissenting (Binnie, J.) opinions. While the Court ultimately concluded that the Manitoba *Child and Family Services Act* was constitutional, the strongly worded dissent of Justice Binnie also presented valid legal arguments which supported his conclusion that the *Act* was not constitutional.

The importance of this case perhaps can best be summed up by a passage from the majority opinion's opening paragraph, which was written by Justice Abella: "One of the most sensitive decisions a judge can make in family law is in connection with the authorization of medical treatment for children. It engages the most intensely complicated constellation of considerations and its consequences are inevitably profound."[21]

**The Majority Opinion**

While the majority opinion agreed with the Manitoba Court of Appeal's decision that ss. 25(8) and 25(9) of the Act were constitutional, it disagreed with the Court of Appeal's conclusion that s. 25(8) of the *Act* "treats all minors under 16 the same way."[22] In order for the *Act* to be constitutional the Abella, J. adopted an expansive interpretation of the 'best interests' in contrast to the strict textualist interpretive approach taken by both Kaufman J. and the Manitoba Court of Appeal. Abella, J. stated: "the interpretation of 'best interests' in s. 25(8)…requires that sufficient account be taken of a particular adolescent's maturity in any given medical treatment context."[23] In other words the Court must also take into consideration an individual's wishes and maturity. However, the Court would still have the determinative ability to decide what is in a child's 'best interests'. This strikingly different approach taken by the majority will be discussed in more detail below.

Abella, J. commenced her analysis by first identifying what A.C.'s constitutional challenge entailed. "The heart of A.C.'s constitutional argument is that there is, in essence, an irrebuttable presumption of incapacity in the Act for those under 16, and that this renders ss. 25(8) and 25(9) of the *Child and Family Services Act* contrary to ss. 2(a), 7 and 15 of the *Charter*."[24] The majority stated that the question which the Court needed to answer was "whether the statutory scheme strikes a constitutional balance between what the law has consistently seen as an individual's fundamental right to autonomous decision making in connection with his or her body and the law's equally persistent attempts to protect vulnerable children from harm."[25] The Court answered this question very carefully. In order to determine the constitutionality of ss. 25(8) and 25(9) Abella, J. conducted a thorough examination of: the entire *Child and Family Services Act*, "the common law of medical decision making" for both adults and minors, and a "comparative review of international jurisprudence, and relevant social scientific and legal literature."[26]

**Relevant sections of the *Child and Family Services Act***

Section 2(1) of the *Act* sets out the 'best interests' standard. It is reproduced below for reference:[27]

> *2(1) The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining the best interests of the child all relevant matters shall be considered, including*
>
> *…*
>
> *(b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet such needs;*
>
> *(c) the child's mental, emotional and physical stage of development;*
>
> *…*
>
> *(f) the views and preferences of the child where they can reasonably be ascertained;*
>
> *…*
>
> *(h) the child's cultural, linguistic, racial and religious heritage.*

As referenced above, sections 25(8) and 25(9) of the *Act* "govern when a court can impose medical treatment at the request of the agency [Child and Family Services]."[28] Abella, J. examined the relevant case law regarding the rights of adults to make decisions about their medical treatments.

***Majority: Review of Case Law***

Abella, J. noted that it is important to examine the legal environment regarding the rights of adults to make their own medical treatment decisions "because it demonstrates the tenacious relevance in our legal system of the principle that competent individuals are - and should be - free to make decisions about their own bodily integrity."[29] She also noted that when competency is not in question the right "'to decide one's own fate' includes the unqualified right to refuse life-saving treatment."[30]

To reinforce these deeply rooted legal principles, the Court considered the leading case of *Malette v. Shulman*,[31] which employed the same legal reasoning. In *Malette* a doctor gave an unconscious woman, of the Jehovah's Witness faith, a blood transfusion despite the fact that she had previously signed a health care card indicating that she would not consent to a blood transfusion.[32] While the treatment "almost certainly saved her life" the doctor was "held liable for battery."[33] He appealed the conviction. In the appeal decision, the Ontario Court of Appeal buttressed the rights of competent adults to make determinative decisions about their medical treatments, even when those decisions may be wrong in the eyes of medical professionals:[34]

> *Regardless of the doctor's opinion, it is the patient who had the final say on whether to undergo the treatment...The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care...To transfuse a Jehovah's Witness in the face of her explicit instructions to the contrary would, in my opinion, violate her right to control her own body and show disrespect for the religious values by which she has chosen to live her life...The state's interest in preserving the life or health of a competent patient must generally give way to the patient's stronger interest in directing the course of her own life ... the principle interest asserted by Mrs. Malette in this case - the interest in freedom to reject, or refuse to consent to, intrusions of her bodily integrity - outweighs the interest of the state in preservation of life and health and the protection of the integrity of the medical profession.*

The SCC noted that Canadian case law has determined that competent adults have significant, but not absolute, control over their medical treatments.[35] However, the majority noted that this 'latitude' does not extend to children. They did nevertheless, bring attention to the fact that common law had abandoned "the assumption that all minors lack decisional capacity."[36] Over the past 25 years the doctrine of the 'mature minor' has become more prevalent. Under this doctrine the wishes of older children, who are demonstrably intelligent and display understanding of the issues, should be considered. This doctrine was first established in 1985 by the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority*:[37]

> *Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorize the medical man to make the examination or give the treatment which he advises.*

*Gillick* was a landmark case for establishing "an era of judicial respect for children's rights to [medical] self-determination."[38] However, the majority of the SCC Justices noted that in *Gillick* "the issue was a child's ability to authorize treatment that a medical professional considered to be in the child's best interests."[39] It is the 1992 English Court of Appeal case of *Re W*[40] which is more relevant in the present instance, where the court dealt with the question of whether they could "override an adolescent's refusal of treatment in the face of great injury or even death."[41]

The SCC Justices noted that in *Re W* the court built upon the precedent of another English Court of Appeal case *Re R*,[42] which also dealt with the right of a minor to decide the course of their own medical treatment. Both cases established that "even 'mature minors' were subject to the courts inherent *parens patriae* jurisdiction."[43] This jurisdiction "was found by the court to be broader than the powers of a natural parent, and justified overriding the treatment wishes of even a '*Gillick*-competent' minor."[44] The Justices in *Re W* stressed that even though the court could authorize treatment of a '*Gillick*-competent' minor "under its *parens patriae* jurisdiction, the wishes and objections of a minor would necessarily factor significantly into any assessment of his or her 'best interests'."[45]

While *Gillick*, *Re R* and *Re W* established that a court should take the wishes of a child or 'mature minor' into consideration "in accordance with the minor's maturity"[46] these cases "confirmed that a child's '*Gillick*-competence' or 'mature minor' status at common law will not necessarily prevent the court [by way of its *parens patriae* jurisdiction] from overriding the child's wishes in situations where the child's life is threatened."[47] The SCC noted that these three cases, which "represent the law for adolescent's medical decision-making capacity in the United Kingdom,"[48] have also been applied in Canadian jurisprudence.[49]

After a thorough examination of the Canadian cases where the 'mature minor' doctrine had been applied, Abella, J. noted that the only instance where a child's "decisional capacity to refuse treatment has been upheld" was when "the court has accepted that the mature child's wishes have been consistent with his or her [court determined] best interests."[50]

Having determined there were no cases in either Canada or the U.K. which held that a 'mature minor' should be afforded the same medical self-determination rights of an adult, the Court then reviewed relevant American and Australian case law.

The Court noted that the U.S. Supreme Court "has never commented directly on the legal rights of mature adolescents to direct their own medical care".[51] The Court referred to *Bellotti, Attorney General of Massachusetts v. Baird*,[52] where the U.S. Supreme Court "indicated that adolescents' constitutional rights could not be 'equated with those of adults' due to the 'particular vulnerability of children; their inability to make critical decisions in an informed manner; and the importance of the parental role in child rearing.' "[53] Abella, J. further referred to *Parham*,[54] in which the U.S. Supreme Court held that "[m]ost children even adolescents, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment"[55]

Abella, J. ultimately confirmed that, "[a]s in the U.K. and Canada, no state court has gone so far as to suggest that the 'mature minor' doctrine effectively 'reclassifies' mature adolescents as adults for medical treatment purposes."[56]

The Court stated that Australian courts "have recognized [and applied] the 'mature minor' rule" as set out in *Gillick*.[57] However, the SCC also noted that "Australian courts have determined that their authority to make orders in respect of children's welfare, including medical treatments, is not limited by the decisions of a '*Gillick*-competent' minor."[58] It was also noted that Australian courts can use either their *parens patriae* jurisdiction or their unique Family Courts' "almost identical statutory jurisdiction" to "override" the "treatment decisions of even mature children."[59]

The majority ultimately concluded that in Canadian and international jurisprudence the 'mature minor' doctrine has not been extended to be determinative of a child's 'best interests' regarding medical treatment decisions "where the consequences [of refusing medical treatment] are catastrophic."[60]

*Majority: SCC Review of Academic Literature*

The Court undertook a thorough examination of academic literature on the subject of the 'mature minor' doctrine and the complexity of defining adolescent maturity.

The Court highlighted the difficulty of Courts face in a broad application of the mature doctrine, stating this "reluctance…seems to stem from the difficulty of determining with any certainty whether a given adolescent is, in fact, sufficiently mature to make a particular [sometimes a life or death] decision."[61]

The Court observed that the "academic legal and social scientific literature in this area reveals…there is no simple and straightforward means of definitively evaluating - or discounting - the myriad of subtle factors that may have affected an adolescent's ability to make mature, stable and independent choices in the medical treatment context."[62] There are "numerous" factors that come into play when attempting to determine an "adolescent's ability to exercise independent" and "mature judgment in making maximally autonomous choices."[63] Adolescents' decisions may be affected or influenced by: "social opinion[s]" and the "social context" of a particular decision; their "health or medical status"; as well as other "external factors."[64]

The Court concluded its academic literature examination by observing that some experts "suggest that children should be entitled to exercise their autonomy only insofar as it does not threaten their life or health."[65] This theory can be seen in the remarks of renowned family law expert John Eekelaar:[66]

> *We cannot know for certain whether, retrospectively, a person may not regret that some control was not exercised over his immature judgment by persons with greater experience. But could we not say that it is on balance better to subject all persons to this potential inhibition up to a defined age, in case the failure to exercise the restraint unduly prejudices a person's basic or developmental interests?*

The academic and social scientific literature informed a significant component of the Court's assessment. It reinforced both the difficulty of rendering a legally sound judgment, and the importance that this judgment would inevitably have upon the ability of every Canadian under the age of majority to make determinative decisions about their medical treatments.

***Majority: Best Interests of the Child***

The majority said that the interpreted approach to 'best interests' needed to be "consistent with international standards, developments in the common law, and the reality of childhood and child protection."[67] The "purpose of the 'best interests' standard is to provide courts with a focus and perspective through which to act on behalf of those who are vulnerable."[68] Abella, J. noted that while competent adults should have the right to "independently assess and determine their own best interests", it is the "strong claims to autonomy" of mature adolescents which "exists in tension with a protective duty on the part of the state [to act on behalf of those who are vulnerable]."[69]

The Court also brought attention to the distinction between a child who comes before the Court where "his or her life or health will not be greatly endangered by the outcome of any particular treatment decision", and one who

comes before it under s.25(8) of the Manitoba *Child and Family Services Act*. In the latter instance "child protective services have concluded that medical treatment is necessary to protect his or her life or health."[70] Abella, J. stated that because of the "ineffability inherent in the concept of 'maturity' " the state is justified in "this very limited class of cases" to determine "whether allowing the child to exercise his or her autonomy in a given situation actually accords with his or her best interests."[71]

The majority stated that adolescents are entitled to be heard in such cases: "[t]he more a court is satisfied that a child is capable of making a mature, independent decision…the greater the weight that will be given to his or her views when a court is exercising its discretion under s.25(8)."[72] The Justices concluded that "[i]f, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected. Such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity."[73]

The Court concluded that "the 'best interests' standard must be interpreted in a way that reflects and addresses an adolescent's evolving capacities for autonomous decision making."[74] "It is not only an option for the court to treat the child's views as an increasingly determinative factor as his or her maturity increases, it is, by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates."[75]

The majority asserted that s.2(1) of the Manitoba *Child and Family Services Act* buttresses this interpretive approach to accord with the 'best interest' standard found in s.25(8). They noted that s.2(1) enumerates "considerations to be included in making such a determination."[76] While no one factor in s.2(1) is given priority over another "the blending of these factors" will yield an individualistic determination of the best interests standard.[77] This in turn would then help a court to determine how much autonomy a minor should be afforded in any given situation.

Abella, J. stated that "[w]ith our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the 'best interests' assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures."[78] Furthermore, the Court noted that the world's cornerstone of children's rights, The United Nations *Convention on the Rights of the Child* (of which Canada is a signatory), in Article 12 requires State Parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[79]

The Court stated that "a child's maturity in a s.25(8) best interests analysis will require, by definition, an individualized assessment, having regard to the unique situation of the particular child, including the nature of the treatment decision and the severity of its potential consequences."[80] "In those most serious of cases…a careful and comprehensive evaluation of the maturity of the adolescent will necessarily have to be undertaken to determine whether his or her decision is a genuinely independent one, reflecting a real understanding and appreciation of the decision and its potential consequences."[81]

***Constitutionality of ss. 25(8) and 25(9)***

In considering the constitutionality of subsections 25(8)(9), Abella, J. stated: "[t]he best interests standard must be interpreted in a way that is not arbitrary (to avoid violating s.7 of the *Charter*); not discriminatory on the basis of age (to avoid a s.15 violation); and not contrary to a child's right to freedom of religion protected by s.2(a)."[82]

***Majority: s.7 analysis***

The Court first turned to the question of whether their interpretation of the 'best interests' standard violated A.C's s.7 *Charter* rights to life, liberty and security of the person. Abella, J. stated that an order which imposed "medical treatment under s.25 implicates a child's liberty and security of the person."[100] The Court then considered if such an order deprives a child's s.7 Charter rights. The Court quoted Justice Wilson stated in *Morgentaler* that "[l]iberty properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance."[83] Abella, J. stated that liberty is engaged where "state compulsions or prohibitions affect important and fundamental life choices"[84]

A.C.'s right to security was also affected. The Court noted that in *Rodriguez*, Justice Sopinka had emphasized the concept of security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."[85]

Abella, J. held that the *Act* did constitute "a deprivation of liberty and security of the person."[86] In order for the *Act* to be found constitutional, regarding s.7, these deprivations had to be "in accordance with the principles of fundamental justice."[87]

In determining whether this was the case, the Justices referenced two landmark Canadian cases *(Rodriguez and Chaoulli)* which involved s.7 jurisprudence. In these cases the court identified when a law would be deemed arbitrary, and therefore contrary to the principles of fundamental justice. Quoting from these decisions Abella, J. stated that a law will be considered arbitrary:

> *where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect.*[88]
>
> *In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals [paras. 130-31. Chaoulli].*[89]

The legislative objective was to protect vulnerable children from harm.[90] The Court stressed the fact that the state needed to be able to protect children. It referred to *B. (R.)*, where Justice La Forest discussed the importance of the state's role in protecting children: "[t]he protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure."[91]

Abella, J. noted the challenges when "a child's interest in exercising his or her autonomy conflicts with society's legitimate interest in protecting him or her from harm."[92] She considered that the infringement was not arbitrary as: the 'best interest' standard was interpreted to recognize that not all minors under the age of 16 were the same; and that mature adolescents were more likely to be able to articulate their wishes with respect to medical treatment.[93]

Abella, J. concluded the s.7 analysis by stating the interpretation of the 'best interests' standard "strikes what seems to be an appropriate balance between achieving the legislative protective goal while at the same time respecting the right of mature adolescents to participate meaningfully in decisions relating to their medical treatment."[94] Therefore subsections 25 (8) and (9) did not violate s.7 of the *Charter*. The Court then turned to the question of whether the *Act* was constitutional under s.15 of the *Charter*.

***Majority: s.15 analysis***

The Court noted applied the following two-part test to determine if there was a breach of s.15(1) of the *Charter*:[95]

> *(1) Does the law create a distinction based on an enumerated or analogous ground (identified in s.15(1))?*
> *(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?*

This test was confirmed by the SCC in *R v. Kapp*.[96]

The court noted that such age distinctions "have frequently been upheld by this Court."[97] "Age-based distinctions are a common and necessary way of ordering our society."[98] In the context of s.15 "all age-based legislative distinctions have an element of this literal kind of 'arbitrariness'", and that this alone does not invalidate such legislation "[p]rovided that the age chosen is reasonably related to the legislative goal."[99]

Since the interpretative approach employed by the majority with respect to the 'best interests' standard within the *Act*, allows individuals under the age of 16 to express their views with respect to medical choices, and to have such views considered in accordance with their level of maturity, there was no disadvantage based on prejudice or stereotype.

***Majority: s.2(a) analysis***

The last issue before the Court was whether the *Act* violated A.C's rights to religious freedom under s.2(a) of the *Charter*.

Abella, J. noted that one of the factors listed under s.2(1) of the *Act* to determine the 'best interests' of a child is "the child's…religious heritage."[100] Under the Court's interpretation of the 'best interests' standard of the *Act*, children under 16 have the ability to express their views and to the right to have those views considered. This includes views based upon religious beliefs. For these reasons the majority concluded that the *Act* did not violate A.C.'s s.2(a) *Charter* rights and was therefore constitutional.

***Majority: Conclusion***

Abella, J. concluded that under this new interpretation "adolescents will have the right to demonstrate mature medical decisional capacity."[101] This interpretation "precludes a dissonance between the statutory provisions and the *Charter*, since it enables adolescents to participate meaningfully in medical treatment decisions in accordance with

their maturity, creating a sliding scale of decision-making autonomy."[102] The Court considered that this "sliding scale" protects "both the integrity of the statute and of the adolescent" because it "reflects a proportionate response to the goal of protecting vulnerable young people from harm, while respecting the individuality and autonomy of those who are sufficiently mature to make a particular treatment decision."[103]

The majority held that: the legislative scheme created by ss. 25(8) and 25(9) of the *Child and Family Services Act* "is neither arbitrary, discriminatory, nor violative of religious freedom."[104] The 'best interests' standard of the *Act* would permit adolescents to participate in medical treatment decisions. Accordingly, the *Act* was constitutional.

The Court commented on issues that were not before the Court. The issue of A.C's capacity was not in issue. Since the issue that was before the courts was "strictly one of statutory interpretation"[105] the Justices stated that there was "no reviewable judicial determination before us as to A.C.'s ability to make an independent, mature decision to refuse the blood transfusions, in accordance with the intense scrutiny contemplated in these reasons for such circumstances."[106]

The Court awarded costs to A.C. since she "successfully argued that the 'best interests' standard should be interpreted to allow an adolescent under the age of 16 to demonstrate sufficient maturity to have a particular medical treatment decision respected."[107]

**The Concurring Opinion**

Chief Justice McLachlin wrote a concurring opinion in which she was joined by Justice Rothstein. McLachlin, C.J.C. concluded that the Act was constitutional but differed from the majority with respect to the applicability of the 'mature minor' doctrine.

McLachlin, C.J.C. noted that the 'mature minor' doctrine is the "relevant common law with respect to capable adolescents' consent to medical treatment."[108] However, in her analysis, the 'mature minor' doctrine was supplanted by the *Child and Family Services Act*.

This same reasoning was found in the Court of Appeal's decision where Justice Steel observed that:

> The language in s. 25(8) and (9) read together is sufficiently clear to oust the common law rule for those under 16. The legislature intended to supersede the common law and to implement a specific policy choice based upon the best interests of a child under 16 in cases where there has been a determination that a child's life or health is being endangered. Continued application of the mature minor rule in that situation would be inconsistent with the express provisions of the *CFSA*.[109]

McLachlin, C.J.C. noted that in order to determine what is in the best interests of the child "the judge must consider all relevant circumstances, including the child's needs, mental and emotional maturity and preferences. The judge must weigh the various relevant factors and on that basis arrive at a decision as to whether an order for treatment is in the child's best interests."[110] McLachlin, C.J.C. concluded her examination of the *Act* by stating that "the more dangerous the situation from the perspective of the child's security of person, the more compelling must be the case that the child is fully mature, not only in matters of intellect and understanding, but in comprehension of the potential life that lies before her and the full future impact of her immediate choice."[111]

***Concurring: s.7 analysis***

McLachlin, C.J.C. considered s. 25(8) does "deprive a child under 16 of the 'liberty' to decide her medical treatment."[112] However, the deprivation was not contrary to the principles of fundamental justice."[113] Autonomy rights under s.7 are "not absolute, even for adults."[114] As the SCC had previously held that "the principles of fundamental justice in child protection proceedings are both substantive and procedural."[115]

McLachlin, C.J.C. then proceeded to determine whether the *Act* was arbitrary on either substantive or procedural grounds.

In order for the *Act* to be deemed arbitrary it must bear "no relation to, or is inconsistent with, the objective that lies behind the legislation."[116] "The question in every [s.7] case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair."[117] McLachlin, C.J.C. stated: "The objective of the statutory scheme is to balance society's interest in ensuring that children receive necessary medical care on the one hand, with the protection of minors' autonomy interest to the extent this can be done, on the other."[118]

McLachlin, C.J.C. considered that the *Act* "requires the judge to take account of the treatment preference of a minor under 16 as a factor in assessing the child's 'best interests', while refusing to give it the presumptive weight it would carry with a child aged 16 or older."[119] The "impugned distinction" was not arbitrary, since "this distinction reflects the societal reality of how children mature, and the dependence of children under 16 on their parents, as well as the difficulty of carrying out a comprehensive analysis of maturity and voluntariness of the kind described by the Director in the exigent circumstances of crucial treatment decisions in cases such as A.C.'s."[120]

Regarding the procedural element, McLachlin, C.J.C. stated that The *Act* is not arbitrary on procedural grounds: subsections 2 (2) and (3)"[r]ead together. . . illustrate a considered approach by the legislature to providing age-appropriate notice to the children who may be the subject of proceedings under the CFSA, consistent with s. 7 of the *Charter.*"[121]

S.2(2) states that "a child 12 years of age or more is entitled to be advised of the proceedings and of their possible implications for the child and shall be given an opportunity to make his or her views and preferences known to a judge or master making a decision in the proceedings."[122] Subsection 2(3) "gives the judge a discretion to consider the views of a child under the age of 12."[123] Therefore there was no violation of s.7 of the *Charter*.

***Concurring: s.15 analysis***

McLachlin, C.J.C. considered that there was no violation of s.15 of the *Charter*. "Children are a highly vulnerable group"[124] The *Act* drew a distinction between minors who are under 16 and those who are over 16. This distinction was "ameliorative" and "not invidious" for two reasons.

> First, it aims at protecting the interests of minors as a vulnerable group. Second, it protects the members of the targeted group - children under 16 - in a way that gives the individual child a degree of input into the ultimate decision on treatment.[125]

This distinction was "not discriminatory within the meaning of s.15." There was no violation of s.15.

***Concurring: s.2(a) analysis***

McLachlin, C.J.C. stated that the *Act* did breach A.C.'s s.2(a) *Charter* rights to religious freedom, but that the *Act* was saved under s.1 of the *Charter* since " [t]he objective of ensuring the health and safety of vulnerable young people is pressing and substantial, and the means chosen - giving discretion to the court to order treatment after a consideration of all relevant circumstances - is a proportionate limit on the right, thus satisfying the requirements under *R. v. Oakes*."[126]

**The Dissenting Opinion**

The dissenting opinion was written by Justice Binnie. He disagreed with the other opinions because he believed that the *CFSA* unjustifiably put the determinative decision of adolescents under the age of 16 and the 'best interests' determination in the hands of a Judge; even when the minors are judged by the court to have capacity. He believed that minors under 16 who have the capacity to refuse life saving treatment should have their choice respected, not determined by a Judge.

Justice Binnie stated as a general principle:

> The *Charter* is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the *Charter* would be superfluous.[127]

If there was any doubt as to A.C.'s (or any minors' capacity) "the state would be entirely justified in taking the decision away from A.C."[128] However, in the present instance, A.C. was judged to have had capacity. He identified that the force of her argument is that "whether judges, doctors and hospital authorities agree with A.C.'s objection or not, the decision belongs to the patient. The essential question is not what is to be decided about medical treatment but who is to make the decision."[129] He says that "the heart of A.C.'s argument…is that the individual autonomy vouchsafed by the *Charter* gives her the liberty to refuse the forced pumping of someone else's blood into her veins regardless of what the judge thinks is in her best interest."[130] Binnie J. concludes his opening remarks by stating that the *CFSA* "is insufficiently respectful of constitutional limits on the imposition of forced medical treatment on a mature minor."[131]

In his analysis he brings attention to the fact that Manitoba's own Law Reform Commission, in a report prepared in consultation with the province's physicians, concluded that a 'fixed age' limit with respect to a minor's medical consent is neither 'practical or workable':[132]

> *There was quite strong opposition to the use of a fixed age limit; the development of children was seen to be too variable to permit a fixed age to be a practical or workable concept.*

Binnie J. notes that if A.C. had been 14 months older at the time of her hospitalization, then she would have been able to benefit from s. 25(9) of the *Act* which presumes that minors over 16 have determinative decisional making capabilities, unless proven otherwise. In this instance her capacity to express her wishes with respect to her medical treatment was not considered by either Kaufman J. or the Manitoba Court of Appeal. Kaufman J. ruled that A.C.'s capacity to give or refuse consent to her own medical care was "irrelevant". Binnie J. concluded that this was "precisely the problem with the Charter-breaching procedure adopted by the applications Judge."[133]

Binnie stated that A.C. "is entitled to have her appeal disposed of on the basis that, as the formal order states, she 'is a person with capacity to give or refuse consent to her own medical care.' "[134]

He notes that "proof of capacity entitles the 'mature minor' to personal autonomy in making decisions." He

points out that it is "very difficult to persuade a judge that a young person who refuses potentially lifesaving medical treatment is a person of full capacity."[135] However, "the Charter required such an opportunity to be given in the case of an adolescent of the age and maturity of A.C. The fact that in the end a judge disagrees with the mature minor's decision is not itself a lawful reason to override it."[136]

Justice Binnie prefaced his analysis of the constitutionality of the *Act* by noting that:

> *Individuals who do not subscribe to the beliefs of Jehovah's Witnesses find it difficult to understand their objection to the potentially lifesaving effects of a blood transfusion. It is entirely understandable that judges, as in this case, would instinctively give priority to the sanctity of life. Religious convictions may change. Death is irreversible. Even where death is avoided, damage to internal organs caused by loss of blood may have serious and long lasting effects. Yet strong as is society's belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose medical treatment except as that autonomy may be limited or prescribed within the framework of the Constitution.*[137]

He noted that A.C.'s position in this case "has been that once it is established that she is an individual with "capacity" the applications judge ought to cede to her the power to decide to have or not to have the blood transfusion."[138] He said that "the sliding scale of weight the majority is prepared to give to her views is not responsive to her argument. Her point is: who decides?"[139]

Regarding a Canadian's *Charter* rights to personal autonomy, Binnie J. stated that a "competent and informed adult may always refuse treatment. This is a right that long predated the *Charter*."[140] He noted that the SCC has previously stated in *Ciarlariello* that "[t]he fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination."[141]

Binnie, J. referenced a number of cases in common law countries regarding "the right to refuse medical treatment, even if this leads to death."[142] He then referenced several Canadian examples, namely *Malette* and *Nancy B.* Regarding minors' rights to personal autonomy under the *Charter*, Binnie J. referenced the case of *Van Mol (Guardian ad Litem of) v. Ashmore*,[143] where the B.C. Court of Appeal recognized the right of 'mature minors' to personal autonomy:[144]

> *But once the required capacity to consent has been achieved by the young person reaching sufficient maturity, intelligence and capability of understanding, the discussions about the nature of the treatment, its gravity, the material risks and any special or unusual risks, and the decisions about undergoing treatment, and about the form of the treatment, must all take place with and be made by the young person whose bodily integrity is to be invaded and whose life and health will be affected by the outcome.*

Binnie J. stated that:

> *if a teenager (as in this case) does understand the nature and seriousness of her medical condition and is mature enough to appreciate the consequences of refusing consent to treatment, then the justification for taking away the autonomy of that young person in such important matters [in order to protect minors who do not have the capacity, as determined by a court, to make their own medical treatment decisions] does not exist."*[145]

He again indicated that the central issue in this case is:

> *whether the state can impose a 'best interests of the child' test when the judge accepts that the factual basis for its imposition [in this case that A.C. was determined by Kaufman J. to have 'capacity'] does not exist."*[146]

Binnie, J. then considered on to the *Act's* constitutionality.

***Dissenting: s.2(a) analysis***

Binnie, J. stated that A.C.'s religious beliefs were "sincere as must be established by a s.2(a) claimant."[147] He concluded that "the interference with A.C.'s religious conscience far exceeded the 'non-trivial' threshold established in *Amselem*, and it was rightly conceded by the respondent that s. 25 CFSA violated s. 2(a)" In order for the law to be found constitutional it had to satisfy the Oakes test. Binnie J.'s assessment is discussed below in the section dealing with his s.1 analysis.

***Dissenting: s.7 analysis***

Binnie J. notes that, regarding the liberty interest in s.7, the SCC had previously stated that "[i]n a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[148] For a Jehovah's Witness, "nothing is of more 'fundamental personal importance' than observance of the teachings of the church"[149] which explicitly prohibits blood transfusions. Binnie J. strongly asserts that the court "has thus long preached the values of individual autonomy." "[I]n this case, we are called upon to live up to this s.7 promise."[150] He said that while the majority of Canadians may:

> instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life…it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God's commandment."[151]

Regarding the right to security of the person in s.7, Binnie J. concluded that " [a]n unwanted blood transfusion violates what *Chaoulli* describes as the fundamental value of "bodily integrity free from state interference."[152]

Binnie, J. considered the *Act* was not in accordance with the principles of fundamental justice. The principles of fundamental justice at issue are both procedural and substantive.[153] With respect to the substantive element, Binnie J. stated that the "irrebuttable presumption takes away the personal autonomy of A.C. and other 'mature minors' for no valid state purpose."[154] He considered that "the purpose of the CFSA is to defend the 'best interests' of children who cannot look after themselves and who are, therefore 'in need of protection.'"[155] He points out that in the record A.C. did "have capacity". He notes that:

> If the legislative net is cast so widely as to impose a legal disability on a class of people in respect of an assumed developmental deficiency that demonstrably does not exist in their case, it falls afoul of the 'no valid purpose.'[156]

Binnie, J. stated that "the procedures in the CFSA are deficient because they do not afford a young person the opportunity to rebut the very presumption upon which the court's authority to act in the best interests of the young person rests — the presumption that she is incapable of making that decision for herself. Section 25's failure to leave room (in what is conceded to be an individualized process) for the young person to rebut this presumption violates fundamental procedural fairness."[157]

***Dissenting: s.15 analysis***

Binnie, J. considered it was not necessary to decide whether the *Act* violated A.C's s.15 *Charter* rights. "Her fundamental concern is with the forced treatment of her body in violation of her religious convictions. In the circumstances, I think that rather than pursue a full s.15(1) analysis, it is preferable to treat the elements of her s.15 argument as part of A.C.'s response to the government's s. 1 justification to the violations of s.2(a) and s.7 of the Charter."[158]

***Dissenting: s.1 analysis***

In conducting the s.1 *Oakes* analysis Justice Binnie had to determine whether the CFSA identified his problem with the CFSA. It:

> acknowledges in s. 25(9) that mature minors who are 16 and over are presumed to be of sufficient capacity to make their own treatment decisions, and it seems to me 'arbitrary, unfair or based on irrational considerations' (as those words are used in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 139) to deny mature minors under 16 the opportunity of demonstrating what in the case of the older mature minors is presumed in their favour.[159]

Therefore, in his opinion, the *Act* did not satisfy part one of the Oakes Test. Binnie, J. then stated that the "irrebuttable presumption of incapacity does not impair 'as little as possible' the right or freedom in question [therefore not satisfying part two of the Oakes Test]."[160]

Binnie, J. further concluded that the CFSA did not satisfy the "proportionality" section of the Oakes test:

> [T]he irrebuttable presumption has a disproportionately severe effect on the rights of mature minors under 16 because they do not suffer from the lack of capacity or maturity that characterizes other minors. The state's interest in ensuring judicial control over the medical treatment of 'immature' minors is not advanced by overriding the Charter rights of "mature" minors under 16 who are in no such need of judicial control. Nor has the respondent shown that the irrebuttable presumption in the CFSA produces 'proportionality between the deleterious and the salutary effects.'[161] Indeed based on what I have already said, I believe A.C. has demonstrated that the deleterious effects are dominant.[162]

Binnie J. therefore concluded that ss.25(8) and 25(9) of the CFSA breached both ss.2(a) and 7, and that neither of these breaches were saved by s.1.

**IV. Impact and Analysis**

This was a very contentious and controversial case. It encompassed on the one hand, the wishes of a 14 year old Jehovah's Witness to refuse a potentially lifesaving blood transfusion on religious grounds, and on the other, the right of the state to protect vulnerable children from harm. The SCC's decision, which I will comment on below, clarified the law relating to the right of Manitoba minors under the age of 16 to participate in their medical treatment decisions. In doing so the Court also set a precedent for other provinces with similarly crafted statutes. I will also comment on the legal arguments of the Justices in reaching their decisions. Finally, I will touch on what the Court did not address in its decision as well as the issues facing the difficult and complex

area of law relating to children and adolescents that were highlighted by this case.

The SCC's decision in this case clarifies sections 25(8) and 25(9) of the Manitoba *Child and Family Services Act*. These sections had previously been interpreted by the Manitoba courts as conferring unlimited power to act in accordance with the court's conception of the minor's 'best interests.' However, the SCC took a somewhat different interpretive approach which found that in order for ss. 25(8) and 25(9) to be constitutional, minors under the age of 16 were entitled to have their views considered as part of the 'best interests' determination by a court. The SCC called this approach a "sliding scale of decision-making autonomy."[163] The more mature an individual is held to be by the court, the more weight her view should be given. While the SCC held that the court has the authority under s.25(8) to make a determinative decision as to what medical treatments are in a child's 'best interests', the views of minors under the age of 16 must be considered.[164]

This interpretation taken by the majority will likely have long reaching policy implications for all provincial governments as well as every Canadian adolescent. While this decision was rendered nearly five years ago, it is as yet difficult to measure its impact upon the medical and legal world. However, it has certainly changed the relationship between adolescents and the Manitoba justice system in a way that allows them to be heard on issues related to their medical treatments. As a result of the SCC decision it is also likely that other provinces, with similar Acts, will need to conform with this precedent setting framework established by the majority providing for more input from minors regarding their medical treatment decisions.

The SCC appears to be reluctant to strike down statutes and regulations in a manner that could open the flood gates to potential abuse or widespread societal problems. This fear stems perhaps from other controversial cases in Canadian judicial history, particularly *Morgentaler* where the Court struck down the prohibitions on abortion. As a result of that ruling there have been no Parliamentary restrictions upon abortions since. The hesitancy of the Court to make such rulings can be seen, primarily in the case of *Rodriguez* where the SCC dealt with whether the prohibitions placed upon assisted suicide were constitutional. In their decision the Justices were cognizant of the fact that if this *Criminal Code* prohibition were struck down it could foster a "macabre specialty in this area reminiscent to Dr. Kevorkian and his suicide machine."[165] In the end the Court gave deference to the *Criminal Code* and upheld its prohibition on assisted suicide. A similar analysis can be applied to this case. The Court was asked to determine whether ss. 25(8) and 25(9) were constitutional. The Manitoba Courts had previously interpreted these sections in a way that did not allow for individuals under the age of 16 to have their maturity or their wishes taken into account when the courts decided what was in their 'best interest'. I believe the SCC realized that if it struck down these sections it could lead to a similar situation that had arisen from *Morgentaler* or could have resulted from *Rodriguez*.

The majority of the SCC Justices interpreted ss. 25(8) and 25(9) in a way that supported these sections' constitutionality. These sections would be "arbitrary" if the sections "assume[d] that no one under the age of 16 has capacity to make medical treatment decisions"[166] or of being capable of expressing their wishes. Under the majority interpretation any child under 16 would have their views become "increasingly determinative depending on his or her ability to exercise mature, independent judgment."[167] The majority stated this interpretation "provides that a young person is entitled to a degree of decisional autonomy commensurate with his or her maturity."[168] The Court considered that this interpretation of the 'best interest' standard strikes a proportionate balance between the competing interests at stake.

The majority opinion ultimately concluded that ss. 25(8) and 25(9) of the CFSA were constitutional. However, the majority went to considerable lengths in order to make that determination. It ruled that when the 'best interests' standard is interpreted in a way that allows minors under 16 to have their views taken into account, where more weight is given to more mature minors according to a 'sliding scale', the *Act* is not arbitrary and is therefore constitutional.

> *By permitting adolescents under 16 to lead evidence of sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged.*[169]

> *...the "best interests" test referred to in s. 25(8) of the Act, properly interpreted, provides that a young person is entitled to a degree of decisional autonomy commensurate with his or her maturity.*[170]

While under the majority's interpretive approach minors under the age of 16 will have their views considered in accordance with their court determined maturity, the minors nevertheless cannot make determinative decisions regarding their medical treatments. Given this approach, minors under the age of 16 can never prove sufficient maturity to earn the right to make independent determinative decisions. The final decision still rests with a Judge. In contrast, minors over 16 who may possess a similar, or even a lesser level of maturity, are presumed to have the capacity to make determinative decisions regarding their medical treatments. This gives the appearance of some inconsistency.

The dissenting opinion of Binnie J. raised some cogent arguments. It is difficult to accept that that a mature minor under 16 with the same or greater level of maturity as a minor over 16 cannot make an equally independent decision on medical treatment. Binnie, J. also noted that there were inconsistencies between the procedures under the *CFSA* and those under other Manitoba health care Acts. In both the Manitoba *Health Care Directives Act* and the *Mental Health Act*, the legislation allows for a minor who is under 16 to lead evidence that they have sufficient capacity to be treated as if they were over 16 years of age.

The concurring opinion of Chief Justice McLachlin employed perhaps the most succinct and compelling legal reasoning. The concurring reasons provide a solid analysis to indicate why the s.25(8) deprivation of the liberty of a child under 16 to decide their medical treatments, is constitutionally justified.

It is difficult to argue that in the final analysis the SCC did not make the right decision in this case. This is supported by the fact that 6 of 7 Supreme Court Justices found the *Act* to be constitutional.

The majority opinion did advance the rights of minors to participate in their medical treatment decisions in a way that takes into account their maturity, albeit not as far as allowing them to make the final decision. It should be noted that maturity is not tied to age. It is an immeasurable concept that at times places the justice system in very difficult circumstances when its precedents are centered on concepts such as the 'sliding scale' of maturity interpretation. These issues do not become any easier when there is a life or death decision to be made. As such, a degree of deference is warranted in constitutional cases dealing with legislatures which attempt to implement policies and statutes that allow every Canadian, including those under 16, to flourish and develop.

While the SCC does not create governmental policy and must give deference to legally passed statutes, the Court's decisions can and do have a deep and profound impact upon Canada's legal and socio-economic environment. The failure of the SCC in this case to comment on how the complex area of law regarding children and adolescents can be better executed is disappointing.

This case serves as a reminder that the law regarding children and adolescents can be complex and emotional. Given that reality, the SCC failed to bring to the attention of government officials and common citizens how Canada's family law system can be altered for the better. What is needed is a better interconnectedness between all the child and family services departments of the provinces and their respective justice systems. This will facilitate a more efficient way to provide the justice system with information that is so often unavailable, so that they can then make better informed legal judgments while at the same time getting the judgment right with regards to the relevant situation of the minor in question.

To me what was somewhat troubling about this case was the process related to A.C.'s psychiatric assessment and factors that were not addressed in any detail. A.C. was assessed by three hospital psychiatrists for a total of 105 minutes, according to the record. Her parents were also in the room throughout. A more comprehensive assessment, without her parents present, may have led to a more insightful understanding of A.C.'s views and the reasons for them.

Of greater concern was the singular focus on 'maturity' as the key determinant of the capacity of a minor to be able to make decisions in their own best interest. A minor's level of maturity is undoubtedly a key factor. However, if A.C.'s thinking was excessively influenced by such powerful sources as her parents or her church, this could have been significant. If such influences existed and were so powerful as to make it difficult or impossible for this young minor to think independently or reach reasoned, objective and informed decisions about her medical treatment, then perhaps her capacity to make such decisions in her own 'best interests', was compromised. Whether such influences were sincerely held views, or well intentioned, is not the issue. While the record does not disclose how deeply the psychiatrists analyzed these matters, it is nevertheless unfortunate that these considerations did not get much attention by the courts.

Based upon the evidence presented in this case, it seems a virtual certainty that a young life was saved. While the SCC felt that A.C's court determined 'best interests' prevailed over her stated wishes with respect to medical treatment, the rights of young minors (under 16) to have their views heard and considered, was assured. ■

**Endnotes:**

[1] *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181. para. 5.

[2] Id., para. 6.

[3] Ibid.

[4] Ibid.

[5] bid.

[6] Id., para. 7.

[7] Id., para. 8.

[8] Id., para. 9.

[9] Id., para. 11; Kaufman J.'s decision at p. 171.

[10] Id., para. 12.

[11] Id., para. 14.

[12] Id., para. 15; Manitoba Court of Appeal para. 21.

[13] *A.C. v. Manitoba* at para. 15.

[14] Id., para. 16.

[15] Id., para. 17.

[16] Id., para. 18.

[17] *R v. Oakes*, [1986] 1 S.C.R. 103

[18] *R v. Oakes* at paras. 69-70.

[19] *A.C. v. Manitoba* at para. 18.

[20] Id., para. 19; Manitoba Court of Appeal at para. 105.

[21] *A.C. v. Manitoba* at para. 1.

[22] Id., para. 21; Manitoba Court of Appeal at para. 49.

[23] Id., para. 21.

[24] Id., para. 25.

[25] Id., para. 30.

[26] Ibid.

[27] Id., para. 32. Emphasis deleted from SCC judgment.

[28] Id., para. 37.

[29] Id., para. 39.

[30] Id., para. 40; *Re T (adult: refusal of medical treatment)*, [1992] 4 AII E.R. 649 (C.A.), at p.661.

[31] *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.)

[32] *A.C. v. Manitoba* at para. 41.

[33] Ibid.

[34] *Malette* at pp. 424, 426, 429, 430.

[35] see for example: *Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 336 (for context) & p. 346 where Dickson J. said that"[t]he ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government."; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119, at p. 135; *Rodriguez v. British Columbia (Attorney General)*, [1993] 2 S.C.R. 519, at s. 15 Charter analysis part c - ii & at s.1 Charter analysis part b - legislative objections - where Lamer C.J.(dissenting, but not on this issue) said that "the scope of self-determination with respect to bodily integrity in our society is never absolute..."

[36] *A.C. v. Manitoba* at para. 46.

[37] *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 AII E.R. 402. at p. 409.

[38] *A.C. v. Manitoba* at para. 52.

[39] Ibid.

[40] *Re W (a minor) (medical treatment)*, [1992] 4 AII E.R. 627

[41] *A.C. v. Manitoba* at para. 54.

[42] *Re R (a minor) (wardship: medical treatment)*, [1991] 4 AII E.R. 177 (C.A.)

[43] *A.C. v. Manitoba* at para. 54.

[44] Id., para. 54.

[45] Id., para. 55.

[46] Ibid.

[47] Id., para. 56.

[48] Ibid.

[49] For example see: *J.S.C. v. Wren* (1986), 76 A.R. 115 (C.A.); *H.(T.) v. Children's Aid Society of Metropolitan Toronto* (1996), 138 D.L.R. (4th) 144 (Ont. Ct. (Gen. Div.)); Dueck (Re) (1999), 171 D.L.R. (4th) 761 (Sask. Q.B.); *Alberta (Director of Child Welfare) v. H.(B.)*, 2002 ABPC 39, [2002] 11 W.W.R. 752

[50] *A.C. v. Manitoba* at para. 62; for example see: Re L.D.K. (1985), 48 R.F.L. (2d) 164 (Ont. Prov. Ct. (Fam. Div.)); and Re A.Y. (1993), 111 Nfld. & P.E.I.R. 91 (Nfld. S.C.)).

[51] A.C. v. Manitoba at para. 65.

[52] *Bellotti, Attorney General of Massachusetts v. Baird*, 443 U.S. 622 (1979)

[53] *A.C. v. Manitoba* at para. 65; p. 643 Belotti

[54] *Parham, Commissioner, Department of Human Resources of Georgia v. J. R.*, 442 U.S. 584 (1979)

[55] Id., p. 603.

[56] *A.C v. Manitoba* at para. 66.

[57] Id., para. 67.

[58] Id., para. 68.

[59] Ibid.

[60] Id., para. 69.

[61] Id., para. 70.

[62] Ibid.

[63] Id., para. 72.

[64] Id., paras. 72-78.

[65] Id., para. 79.

[66] *The Emergence of Children's Rights* (1986), 6 Oxford J. Legal Stud. 161, at pp. 181-182

[67] *A.C. v. Manitoba* at para. 80

[68] Id., para. 81.

[69] Id., paras. 81-82.

[70] Id., para. 86.

[71] Ibid.

[72] Id., para. 87.

[73] Ibid.

[74] *A.C. v. Manitoba* para. 88.

[75] Ibid.

[76] Id., para. 89.

[77] Id., para. 90.

[78] Id., para. 92.

[79] Article 12 of the *United Nations Convention on the Rights of the Child*

[80] *A.C. v. Manitoba* at para. 94.

[81] Id., para. 95.

[82] Id., para. 97.

[83] Id., para. 100; *R v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 166

[84] *A.C. v. Manitoba* at para. 100; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] s S.C.R. 307 (para. 49)

[85] *A.C. v. Manitoba* at para. 100; Rodriguez (p. 587-588)

[86] *A.C. v. Manitoba* at para. 102.

[87] Ibid.

[88] *Rodriguez* at pp. 594-595

[89] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791

[90] *A.C. v. Manitoba* at para. 104.

[91] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 88

[92] *A.C. v. Manitoba* at para. 106.

[93] Id., para. 107.

[94] Id., para. 108.

[95] *Kapp* at para. 17.

[96] *R v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483

[97] *A.C. v. Manitoba* at para. 110.

[98] Id., para. 110; *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 31

[99] *A.C. v. Manitoba* at para. 110; Gosselin at para. 57

[100] s. 2(1)(h) of the CFSA

[101] *A.C. v. Manitoba* at para. 115.

[102] Ibid.

[103] Ibid.

[104] Id., para. 98.

[105] Id., para. 119; Manitoba Court of Appeal at para. 37

[106] *A.C. v. Manitoba* at para. 120.

[107] Id., para. 121.

[108] Id., para. 125.

[109] Id., para. 126; Manitoba Court of Appeal at para. 57

[110] *A.C. v. Manitoba* at para. 132.

[111] Id., para. 133.

[112] Id., para. 136.

[113] Id., para. 137.

[114] Ibid; also see footnote 35

[115] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. at para. 70

[116] *Rodriguez* at pp. 619-620

[117] *Chaoulli* at para. 131

[118] *A.C. v. Manitoba* at para. 141.

[119] Id., para. 147.

[120] Ibid.

[121] Id., para 148; Manitoba Court of Appeal at para. 84

[122] *A.C. v. Manitoba* at para. 148; Manitoba *Child and Family Services Act* s. 2(2)

[123] *A.C. v. Manitoba* at para. 148

[124] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76

[125] *A.C. v. Manitoba* at para. 152.

[126] Id., para. 156.

[127] Id., para. 163.

[128] Id., para. 164.

[129] Id., para. 165.

[130] Id., para. 166.

[131] Ibid.

[132] Manitoba. Law Reform Commission. Minors' Consent to Health Care (1995), report #91. Winnipeg: The Commission, 1995. at p. 33.

[133] *A.C. v. Manitoba* at para. 173.

[134] Ibid.

[135] Id., para. 175.

[136] Ibid.

[137] Id., paras. 191-192.

[138] Id., para. 194.

[139] Ibid.

[140] Id., para. 196.

[141] *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119 at p. 135

[142] *A.C. v. Manitoba* at para. 198.

[143] *Van Mol (Guardian ad Litem of) v. Ashmore*, 1999 BCCA 6, D.L.R.

[144] *Van Mol* at para. 75

[145] *A.C. v. Manitoba* at para. 207.

[146] Id., para. 208.

[147] Id., para. 214; for what constitutes a sincere religious belief see: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551

[148] B. (R.) at para. 80

[149] *A.C. v. Manitoba* at para. 217.

[150] Id., para. 219.

[151] Ibid.

[152] *Chaoulli* at para. 122

[153] *A.C. v. Manitoba* at para. 221.

[154] Id., para. 222.

[155] Ibid.

[156] Ibid.

[157] Id., para. 224.

[158] Id., para. 231.

[159] Id., para. 233.

[160] Id., para. 234.

[161] As established in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889

[162] *A.C. v. Manitoba* at para. 237.

[163] Id., para. 115.

[164] Id., para. 116.

[165] Sopinka J. writing for the majority in *Rodriguez*

[166] *A.C. v. Manitoba* at para. 107.

[167] Id., para. 22.

[168] Id., para. 114.

[169] Id., para. 111.

[170] Id., para. 114.

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# A Defense of Judicial Activism under the *Canadian Charter of Rights and Freedoms*

**Devin Drover**

Political Science 3820: Constitutional Law in Canada

Since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, there has been substantial debate about the changed role of the judiciary in Canadian democracy (Cameron 23). Many critics have argued that the *Charter* has created "judicial activism", an "attack on the law" that has allowed legislative decisions to be made by appointed judges, rather than elected representatives (Martin 26). Some scholars have labeled the judiciary as "the most dangerous branch" of the Canadian government (Martin 12). Vic Toews, the Canadian Alliance's Justice critic (now a Justice of the Court of Queen's Bench of Manitoba), stated that post-*Charter* judicial activism has produced "legal and constitutional anarchy" (Anand 87). However, upon analysis of the role of the Supreme Court of Canada since the implementation of the *Charter*, it can be seen that these claims of judicial activism are not only exaggerated, but unwarranted, as the modified role of the judiciary still leaves primary decision making to democratically elected officials. To illustrate this, I will first provide a short definition of "judicial activism" and outline how the judiciary has acted as a law-making body prior to the implementation of the *Charter*. Subsequently, I will examine the "living tree" doctrine of constitutional interpretation, and outline how judicial review of *Charter* rights using only the framers' intent is often unworkable. Lastly, I will show that section 33 of the *Charter* prevents many acts of judicial activism which citizens, or their elected representatives, find inappropriate. It will become clear through this analysis that criticism of post-*Charter* judicial activism is not only misguided and unwarranted but often factually inaccurate.

While there have been many definitions of judicial activism given by legal scholars, these definitions are best summarized by Professor Sanjeev Anand as consisting of the following characteristics: "the tendency for judges to make, as opposed to simply interpret the law; the willingness of courts to issue ruling reversing or altering the legislative enactments of Parliament;[...] and the inability of legislatures to effectively respond to such rulings.." (87). The enactment of the *Charter* in 1982, is seen by many as ushering in an era of activism, allowing the courts to use the "rhetoric of the law" in a "dazzling exercise of self-empowerment." (Cameron 27). While it is true that the role of the judiciary has expanded since the advent of the *Charter*, critics ignore many of the historical realities of Canadian judicial review. Most notably, they ignore the existence of a substantial body of judge-made law that occurred before the introduction of the *Charter* (Anand 87, 89).

Perhaps the most important case of pre-*Charter* judicial activism occurred in 1935 when Mackenzie King referred draft legislation to the Supreme Court of Canada. The draft legislation created mandatory unemployment insurance and imposed other forms of direct market regulation. Despite the will of the Parliament, the legislative package, known as the Canadian "New Deal", was struck down by the Court for offending the division of powers under the *Constitution Act, 1867* (Roach 43). Many were critical of the Court's decision, including the Senate. A 1939 Senate report accused the Court of seriously departing from the actual text of the Constitution (Anand 90). The Court's decision ultimately resulted in the *Constitution* being amended to give the federal government the power to enact the legislation (Roach 44). However, due to the difficulty in amending the Constitution, the amendments did not occur until 1940, at which point many of the changes were no-longer necessary due to changing economic conditions and the end of the Great Depression (Roach 45).

While it remains questionable whether the Court overstepped its boundaries in deciding to strike down the New Deal legislation, the case clearly illustrates that judicial activism is not a post-*Charter* phenomenon despite what *Charter* critics may claim. The responsibility and power of the judiciary to interpret law often compels them to both read in and read down parts of legislation so that laws are compatible with the existing Constitution. This responsibility does not stem from the *Charter*. Instead, such actions can be seen as a clear reflection of the important role of judicial review in any constitutional democracy, and are not directly linked to the *Charter* as a new constitutional document.

The most substantial criticism of the *Charter* comes from decisions on cases surrounding human rights and fundamental freedoms. Professor Peter Hogg has pointed out that due to vague phrases denoting these rights, "judges will inevitably be influenced by their own social, economic and political values" in determining such cases (798). The outcome of many cases over the last thirty years, including those involving gay and transgender rights, freedom of religion, freedom of expression and abortion, have been harshly criticized as being decided through social activism by the

judiciary, rather than through efficient judicial review (Leishman 19-47, Melon 153). These outcomes, critics say, have proven to be a disservice to the *Charter*, as the judiciary often ignores the intent of the *Charter's* framers while deciding fundamental cases (Roach 7). Again, this is a misguided criticism. Past decisions have shown that it is often unworkable to interpret the law as being "frozen" with the enactment of a constitutional document. Instead, it has been continuously proven, and similarly ignored by critics, that the only way to ensure the goal of peace, order, and good governance is to interpret constitutional documents as a "living tree" which can adapt to societal change.

While the goal of this paper is to examine the effect of the *Charter* on judicial activism, it is important to reflect on the creation of the "living tree" principle of constitutional interpretation. The interpretation of the Constitution as a changing document first occurred in the Judicial Committee of the Privy Council's ruling that "persons", as outlined in the Constitution, included women, and therefore they could be appointment to the Senate. The Privy Council declared that the constitution had "planted a living tree capable of growth", and there was no need for strenuous constitutional amendments to resolve the dispute (Anand 90). Therefore, it was established that constitutional documents need not to be entirely "entrenched" in the language they were written, but could instead be interpreted and applied to new realities as society develops (Anand 91).

This "living tree" approach has continued since the introduction of the *Charter*, and is undoubtedly important in the upholding of justice. As Professor Sanjeev Anand points out, if rights were "frozen" with the framer's intent, it would mean that technological and societal developments, such as expressive content on the Internet, would not come within the scope of *Charter* protection (91). By "freezing" rights in this regard, the judiciary would be providing a disservice to Canadians by exposing them to much larger risks that the legislature has not yet had adequate time to address, or may have difficulty in addressing due to political concerns, such as minority Parliaments or the perils of constitutional reform. Thus, it can be concluded that "freezing" rights can, in most regards, prove to be contrary to protecting the fundamental rights of Canadians and providing them with a safe and just society.

Furthermore, if rights are interpreted merely by reference to the framers' intent, it calls into question who the framers are and what was their intent. Due to the nature of the constitutional review, there were many competing and contradictory positions presented by those who drafted the *Charter* (Anand 91). Instead, by using open language, the elected representatives have placed the responsibility to decide these fundamental decisions onto the judiciary. As pointed out by then-Chief Justice Lamer in 1997, "…issues of great importance to the kind of society we want are being made by unelected persons. Now that's a command that came from where? It came from the elected [representatives of the people], that's their doing, not ours" (Anand 90). Critics of the judiciary often ignore this view, believing rulings are the result of judicial activism that is outside of the framers purview. However, at the time the *Charter* was created, many provincial governments were aware of the possibility of different interpretations by the courts. Despite this, they still agreed with the introduction of the *Charter*, putting faith in the ability of the court's to uphold a just society (Anand 90).

While it remains clear that criticism of the *Charter* is unwarranted, it is still important to address the potential impact that judicial activism has on protecting Canadian democracy and allowing fundamental decisions to be made by elected representatives. Rory Leishman, in his book "Against Judicial Activism", has stated that post-*Charter* judicial activism has allowed the Supreme Court of Canada to reign supreme over the legislatures, and in the process, undermine freedom, democracy and the rule of law (3-8). Again, these claims are misguided. Leishman overestimates the authority of the courts while underestimating the ability of the legislatures to reverse decisions through the employment of section 33 of the *Charter*. The 'notwithstanding clause' as it is known, plays a crucial role in limiting the power of the judiciary by allowing legislatures to pass laws which explicitly violate certain *Charter* provisions (Tushnet 53). Section 33 addresses many of Leishman's concerns.

It has been said that every time a government loses a *Charter* case, it leads to a rise in the idea that rights are absolute trumps and that the courts have the final word ("The Supreme Court on Trial" 176). This popular idea has its origins in the United States, in which the *Bill of Rights* gives the courts greater judicial supremacy than the Canadian *Charter* in determining the how society will treat rights and freedoms ("The Supreme Court on Trial" 175). However, with the inclusion of section 33, the *Charter* allows legislatures an opportunity to reject court decisions. Similarly, the Supreme Court has recognized that the structure of the *Charter* means that its decisions need not be the final word in democratic debates ("The Supreme Court on Trial" 176). This was the subject of a comparative study by Professor Kent Roach, who examined the dialogue between the judiciary and legislature in both the United States and Canada. With the enactment of the *Charter*, Professor Roach found that section 33 of the *Charter* has allowed more room for dialogue and democratic decision making than the US *Bill of Rights*, and therefore provides a useful alternative to the polar extremes of legislative and judicial supremacy ("Dialogue or defiance" 347). As a result, Professor Roach maintains that the Canadian judiciary does not reign supreme over elected representatives, despite the claim of Leishman and other critics.

Professor Mark Tushnet, in a critique of Professor Roach's analysis, supports the notion that the notwithstanding clause can be used to deter absolute judicial activism, although he argues that its use is a "political taboo" that deprives it from having any real impact (96). Professor Tushnet points out that, even if there is a determined political majority, they will be cautious in passing legislation reversing a Supreme Court decision that has the support of at least a substantial minority (97). Furthermore, Professor Tushnet argues that parliamentary structure can, in cases of a minority government, delay any effective response from legislators (98). However, given the infrequency of Canadian minority governments, which account for less than a third of total elected parliaments, this cannot be thought to have any substantial impact on a legislature's decision to respond to an act of judicial activism ("Duration of Minority Governments"). As well, if it is the will of the people to elect legislators who do not give a majority support for repealing a specific Supreme Court ruling, Professor Tushnet should not claim this is a restraint on democracy, but the contrary. Instead, this lack of support, and therefore lack of a response, reinforces majority rule decision-making, a staple of the Canadian political system.

The inclusion of the notwithstanding clause, ensured that the enactment of the *Charter* imposed no severe restrictions on Canadian democracy. Instead, the inclusion of section 33 protects Canada from the consequences of the severe type of judicial activism often experienced in the United States. Like other critics of the *Charter*, Leishman's concerns about Canadian judicial supremacy are exaggerated and we should instead embrace the *Charter's* inclusion of the notwithstanding clause as protecting the powers of legislators to serve the people who elected them.

Ultimately, the introduction of the *Charter of Rights and Freedoms* has not changed the role of the judiciary. Despite the claims of many of the *Charter's* critics, judicial expansion did not result in judicial supremacy that overrules the will of the people and their elected legislators. Examining the history of Canadian judicial review and the inclusion of section 33, demonstrates that the *Charter* has complemented, rather than complicated, the delivery of the Canadian promise of Peace, Order and Good Government. ■

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# A Case for Interjurisdictional Immunity: A Reciprocal Doctrine

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Political Science 3820: Constitutional Law in Canada

While there are many doctrines of the *Constitution*, some are used more often than others. Their common practice usually depends on the acceptance of the principle and its utility in contemporary constitutional law. Interjurisdictional immunity (IJI) is one such doctrine that has recently come into question. There are concerns that this principle no longer reflects the expected standards of Canadian law, as it has a history of heavily favouring the federal government's power over the power of the provincial legislatures. Critics also claim it is outdated because it cannot effectively deal with the issues of double aspect and cooperative federalism. It can be argued, however, that interjurisdictional immunity is not a flawed doctrine, but rather it has been applied in a flawed manner, thus producing the negative effects observed by critics. If interjurisdictional immunity was applied properly, meaning reciprocally, it would again gain relevance in constitutional law and could in fact be conducive to modern principles.

Interjurisdictional immunity is a constitutional doctrine that is used to determine the exclusive jurisdiction of provincial and federal powers. While similar to other constitutional doctrines such as paramountcy, it differs from other doctrines in that it applies to situations where legislation may not yet have been made by the incumbent authority (Lessard, 2011: 100). Its central aim is to determine jurisdiction based on the division of powers found in sections 91 and 92 of the *Constitution Act, 1867*. While aspects of the doctrine existed prior to 1966, it was not clearly developed until the Supreme Court of Canada's decision in the *Commission du salaire minimum v. Bell Telephone Co. of Canada* (Penner, 2011: 8). An important aspect of IJI was introduced in that case when the Court found that provincial statutes could not affect any essential or core parts of an enterprise under federal jurisdiction (Gibson, 1969: 53). This created the 'vital core' test that would be used in subsequent IJI conflicts in order to determine which level of government had jurisdiction over the legal issue.

The *Commission du salaire minimum v. Bell* case dealt with the question of which level of government had the power to regulate the minimum wage of employees who worked for federal undertakings such as the Bell Telephone Co. of Canada. In its decision, the Court ruled in favour of the federal government, as the 'core' of the matter was found to be interprovincial communication, thus falling under section 91 of the *Constitution Act, 1867,* (*Commission du salaire minimum v. Bell Telephone Co. of Canada,* 1966). This decision immunized all federal undertakings and their administration from provincial laws, as the 'core' of the matter was found to fall under the federal jurisdiction more often than not. Interjurisdictional immunity came to be associated with favouring the federal government over the provincial legislatures, as the Supreme Court of Canada seemed reluctant to rule in the opposite (Oliver, 2013: 9). As a result, a belief emerged that IJI could not be used to defend provincial jurisdictions and could only be applied asymmetrically to the advantage of the federal Parliament. Condoned by the courts, this permitted the federal government to legislate freely over 'previously unanticipated areas' including trade, commerce, banking, transportation, communication, and the environment (Newman, 2011: 1). This undue favouritism produced by IJI has brought the constitutional doctrine under heavy criticism. Many academics argue that its use has given an unnecessary advantage to the federal government, which already has the privileges of wider resources and a debatably larger jurisdiction (Gibson, 1969: 54). Including its instrumentalities under the cloak of immunity only furthers this inequality as individual citizens are now directly posited against the expansive resources of the federal authority (Gibson, 1969: 54). The criticisms of IJI do not stop with its unfair asymmetrical application. Peter Hogg, Canada's most notable expert on constitutional law, takes even greater issue with the doctrine. He describes interjurisdictional immunity as unprincipled and perverse, that should have no place in Canadian constitutional law as it is inconsistent with both the principles of pith and substance and paramountcy (Penner, 2011: 9). The latter doctrine, which gives priority to federal legislation over provincial, is often described as being superior to IJI as it is "elastic, flexible, modern, and functional with cooperative federalism" (Lessard, 2011: 100).

Together these criticisms have contributed to the 'reigning-in' of interjurisdictional immunity, as the inequality of its application and its confusion with other principles became increasingly apparent. In 2007, the Supreme Court of Canada released its judgment in *Canada Western Bank et al. v. Her Majesty the Queen in Right of Alberta.* The case considered whether federally chartered banks were subject to provincial laws governing the regulation of the sale of insurance (Wonnacott, 2008: 127). The Court found that

"the promotion of authorized insurance was not at the core of banking", and thus IJI could not be applied, preventing the federal powers from making any jurisdictional claims upon it (*Canadian Western Bank v. Alberta*, 2007). More important and relevant to the discussion of IJI, however, was the Court's inclusion of provisions to adjust and narrow the parameters of the constitutional doctrine in an attempt to curtail its broad usage (Penner, 2011: 13). It did this by establishing three new principles to be followed in its application. First, the IJI test was only to be applied in cases where provincial legislation *impaired* the vital and essential parts of the issue at hand, and not simply where it *affected* them; Secondly, it should only be applied in cases where precedents already exist. Thirdly, the doctrine of paramountcy was given precedence over IJI, so as to make the use of the latter required only in rare circumstances (Oliver, 2013: 10). The Court stated "we intend now to make it clear that [we do] not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute" (*Canadian Western Bank v. Alberta*, 2007). It is clear, that the decision creates a more stringent application of interjurisdictional immunity, directed at constraining its use and addressing some of the criticisms noted above. The major difference – the switch from affecting to impairing – was qualified as an adverse consequence that placed the core of the issue in jeopardy (Penner, 2011: 13).

Subsequent cases have followed the *Canada Western Bank* decision. In the 2011 case of *Canada (Attorney General) v. PHS Community Services Society*, the Supreme Court of Canada affirmed the restrictive approach to interjurisdictional immunity, finding that it was "neither necessary nor helpful in the resolution of the contest here between the federal government and the provincial government" (*Canada v. PHS Community Services Society*, 2011). In *British Columbia (Attorney General) v. Lafarge Canada Inc.*, the Supreme Court expressed similar sentiments when it held that the doctrine "should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect" (*British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007). From these examples, it was clear that the judiciary had a newfound interest in curbing the use of interjurisdictional immunity in division of power conflicts.

This new trend reflects the opinions of many critics who argue IJI's relevance in modern constitutional law has long passed. It appears the courts have finally recognized that the doctrine has been applied in a manner that has unduly favoured the federal government at the expense of provinces (Newman, 2011: 1). The judicial branch has attempted to rectify this situation by lessening the importance of interjurisdictional immunity and limiting its applicability to rare cases. These endeavors while correct in recognizing the inequality of IJI's use, are misguided. The solution the courts have proposed is to essentially rid constitutional law of the doctrine due to its many flaws. It can be argued that the doctrine itself is not riddled with flaws, but rather it has been applied in an incorrect manner, thus producing unsatisfactory results. If interjurisdictional immunity was applied reciprocally – allowing provincial legislatures to challenge federal claims to jurisdiction as well – then the doctrine could become a useful and relevant principle in constitutional law. There is no reason in theory that this cannot be done (Lessard, 2011: 100). In fact, in the *Canada Western Bank* case, the Court recognized that this was a possibility: "[i]n theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment" (*Canadian Western Bank v. Alberta*, 2007). While Hogg is critical of the doctrine overall, he too argues that it ought to be reciprocal based on its own logic (Newman, 2011: 2). The number of cases where this has happened, however, have been few (Penner, 2011: 3).

Robin Elliot presents three theories that on their own or as a collective, may explain the lack of provincial IJI activism in Canada's constitutional history. The first he posits, is that the paradigm of favouring the federal government over the provincial may have held back potential challengers as it seems set up to fail; the dominant view that interjurisdictional immunity is the federal government's game alone is likely a factor (Quoted in Penner, 2011: 18). His second rationale is that the federal government is more difficult to challenge on interjurisdictional grounds, as their specific powers are more clearly stated in s. 91 of the *Constitution Act, 1867*, compared to those of the provinces, who have broader heads of power such as the 'all matters of a merely local or private nature' (Quoted in Penner, 2011: 18). Finally, Elliot proposes that the provincial powers do not have control over groups of people as the federal government does; it is easy for IJI cases to arise concerning the administering of federal groups such as the RCMP, postal workers, and military personnel within provinces (Quoted in Penner, 2011: 18). The provincial powers do not have equivalents to these.

Jonathon Penner holds a different theory than Elliot. Instead of arguing that these factors have completely held provinces back from making challenges under interjurisdictional immunity, he proposes that they have simply achieved the same ends through different means. He cites a number of cases where provinces have successfully used the pith and substance doctrine to challenge the federal government's jurisdiction (2011: 21). One such example is *R v. Dominion Stores Ltd.*, where the Supreme Court of Canada found that the federal *Agricultural Products Standards Act* was not applicable to intra-provincial transactions. The result

was the same as what would have happened had the law been challenged under interjurisdictional immunity (2011: 22). Essentially, what Penner is proposing is that IJI is "really nothing more than a particular means of applying the pith and substance doctrine" and thus provinces have benefitted from it even though it was under the title of another principle (2011: 1).

Regardless of which theorist is correct, there is no reason why provinces should not be able to avail of the doctrine when appropriate. In theory, interjurisdictional immunity applies to both levels of government, and it is simply due to the administrative manner of the court system that this has not taken place often in constitutional history. In fact, the first time interjurisdictional immunity was used to successfully defend a provincial claim to jurisdiction was not until 2010 in the *PHS Community Services Society v. Canada (Attorney General)* case (Penner, 2011: 24). This case dealt with a challenge to the federal *Controlled Drugs and Substances Act* by the operation of North America's first safe drug injection site in the east end of Vancouver (*PHS Community Services Society v. Canada (Attorney General),* 2010). It was argued that this facility should be permitted to operate, as the core of its operations had to do with healthcare – not criminal law (Young, 2011: 89). While the Supreme Court of Canada later dismissed the IJI claim and chose instead to focus on *Charter* violations, the B.C. Court of Appeal initially ruled in favour of the province, relying for the first time the doctrine of interjurisdictional immunity to support provincial jurisdiction (Lessard, 2011: 101). The *PHS Community Service Society v. Canada (Attorney General)* is a useful case to demonstrate the viability and capability for interjurisdictional immunity in the future of Canadian constitutional law. This is so, not only because it demonstrates that the doctrine can be used under its proper name to the advantage of a province, but also because it can deal with a situation of double aspect. Double aspect occurs when there is an overlap in jurisdictions; healthcare is good example of this in Canada, where both the federal government and the provincial governments play a role in its administration (Oliver, 2013: 10). A common criticism of IJI, is that it would not be able to deal with such situations. Judge Huddart of the B.C. Court of Appeal counters this, as she argues the successful management of the *Insite* case shows that this is possible: the issue dealt directly with health and its jurisdiction, but was resolved through the doctrine of interjurisdictional immunity and in favour of the province (Lessard, 2011: 103).

The *PHS* case also highlights the ability of IJI to fit the concept of cooperative federalism, not impede it, which was another concern voiced by skeptics (Newman, 2011: 5). Cooperative federalism is the idea that the different levels of a federation will work together to solve issues as a team, rather than conflict with separate policies (Dyck, 1976: 2). It can be argued that this was achieved through the application of IJI in this case as it provided 'breathing room' around an issue that combined both aspects of healthcare and crime which resulted in an acceptable and pragmatic approach to the problem (Lessard, 2011: 102). In addition, it reflected the principle of subsidiarity that suggests "lawmaking and implementation are often best achieved at a level of government that is not only effective but also closest to the citizens affected" (Newman, 2011: 5). Overall, the use of IJI in this case was successful; it respected the separate powers of the different levels of government while coming up with an effective solution to the problem (Oliver, 2013: 10). Although IJI was later dismissed by the Supreme Court of Canada, its application by the B.C. Court of Appeal demonstrates how, if applied properly, the principle is still relevant in constitutional law.

Interjurisdictional immunity, then, can be used to protect the jurisdiction of provinces while also successfully negotiating situations of double aspect and cooperative federalism, as demonstrated by the *PHS Insite* case. Through this instance and others, the courts have shown they are willing to give the provinces increased power if constitutionally viable. There is no reason that IJI cannot be widely relied upon by provinces to defend their jurisdiction. This would balance out the historical favouritism demonstrated towards the federal government as this is not a problem with the doctrine itself, but rather with how it has been applied in the past. IJI needs to be recognized by its proper name in all cases, and its relationship to the pith and substance principle needs to be acknowledged. There is no need to keep it separate, abandon it, or replace it with the supremacy doctrine, as interjurisdictional immunity can be a modern, accommodating, and useful concept if the courts apply it properly and reciprocally. ■

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# The Forgotten Crime: Cultural Genocide under International Law

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Political Science 3210: International Law

Genocide is considered one of the most heinous crimes imaginable; the deliberate extermination of a people is so deplorable that it seems contrarian to imagine debates still exist surrounding the prohibition of the practice. While there is only one universally accepted legal definition of the term, that adopted by the U.N. *Convention on the Prevention and Punishment of the Crime of Genocide*, its parameters are challenged by the postulations of Raphael Lemkin who considers aspects of the crime not usually included in its popular conception. The cultural form of genocide is the most pertinent of these, and which has caused perhaps the most disagreement within academic circles. While its exclusion from the U.N. treaty was defended on moral arguments and practicality, this omission is fundamentally flawed; not only is cultural genocide a legitimate means of destroying an ethnic group, but it also cannot be divorced from other aspects of genocide, such as its recognized physical and biological counterparts. Furthermore, it can be argued this lapse will likely not be rectified, as political reasons played not only a factor during the creation of the original treaty, but continue to today.

The term genocide was originally created in 1944 by Lemkin, a Polish law professor. He combined the Greek word for race (genos) and the Latin word for killing (cide) (Lemkin, 1947: 5). Unlike common conceptions of the crime, Lemkin considered the act to comprise of both physical killings as well as cultural forms of suppression. It involved "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves" (Quoted in Sautman, 2006: 3). This could manifest through the disintegration of culture, language, national feelings, religion, and social institutions, or the erosion of security, liberty, health, and dignity; in extreme circumstances, mass killings could be used to achieve this end as well (Lemkin, 1945). His original postulations presented eight aspects of genocide, however, the physical, biological, and cultural dimensions can be identified as the three most important and relevant to modern societies (Lemkin, 1945).

Within these three, Lemkin identified the cultural dimension as central to the overall conception (Mako, 2012: 180). According to Lemkin, if "the culture of a group is violently undermined, the group itself disintegrates and its members either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganization, and perhaps physical destruction" (Quoted in Short, 2010: 837). Essentially, cultural genocide seeks to eliminate the wider institutions of a group and destabilize its basic way of life. It can manifest in a variety of ways including the abolition of language, restrictions upon traditional practices, prohibition of religious institutions, attacks on academics, as well as the destruction of artistic, literary, or national treasures (Nersessian, 2005). According to Lemkin, then, cultural genocide is a technique to destroy a group by eroding its basic identity and demoralizing its peoples, resulting in its eventual death.

In 1946, Lemkin's conception of genocide formed the basis for United Nations' discussions aimed at the protection of ethnic and minority groups within larger states (Sautman, 2006: 4). These efforts contributed to the formation of the UN Convention on the Prevention and Punishment of the Crime of Genocide in 1948, where Lemkin himself played a crucial role in determining the agreed upon definition which would appear in an international treaty banning the act (Davidson, 2012: 127). An important component for the law professor to have included in the Convention was the protection and recognition of cultural genocide as a serious and relevant form of group destruction (Short, 2010: 839). In initial drafts he was successful in this, as Article III prohibited: "any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial, or religious groups on grounds of national or racial origin or religious belief…" (Quoted in Sautman, 2006: 4). It further banned "prohibiting the use of language of the group; destroying, or preventing the use of libraries, museums, schools, historical monuments, places of worship, or other cultural institutions and objects of the group; and subjecting members of a group to such conditions as would cause them to renounce their language, religion, or culture" (Quoted in Sautman, 2006: 4).

Despite this initial enthusiasm and protection against cultural genocide in the early drafts of the treaty, Article III was challenged by Western countries in the finalizing of the Convention (Davidson, 2012: 127). Dissent arose over its inclusion as it lacked clear boundaries and methods of identification when contrasted with the much more concrete realities of physical and biological genocide (Davidson, 2012: 127). To many participating nations in the Convention negotiations, the main goal of the forum was to guarantee the prevention of mass killings and the physical integrity of groups, not the more nuanced concept of minority culture (Van Krieken, 2008: 78). This sentiment was perhaps best expressed by a United States delegate who argued it "defied both logic and proportion to include in the same convention both mass murders in gas chambers and the closing of libraries" (Quoted in Nersessian, 2005). Instead, it was put forth by these critics that cultural genocide should be addressed through separate international instruments relevant to minorities and human rights protection, rather than be discussed within the parameters of the UN Convention (Sautman, 2006: 5).

Faced with this pressure, the resulting definition included in the treaty did not incorporate the proposed Article III, thus leaving the prohibition of cultural genocide out of the final version (Davidson, 2012: 127). Instead, the treaty focused on the widely-agreed upon banning of physical and biological genocides, just two of Lemkin's eight dimensions. Physical and biological cover both the "tangible annihilation of a group by killing and maiming its members," as well as the imposing of "measures to decreas[e] the reproductive capacity of the group, such as involuntary sterilization or forced segregation of the sexes" (Nersessian 2005). Important to note in the U.N. definition is the qualification that there must be present a specific intent to destroy the group based on their race, religion, language, or other ethnic identifier (Van Krieken, 2008: 76). Without this intent, it can be argued that the act was not genocidal in nature, and rather a result of civil war or other societal violence. In addition to a genocidal intent, five physical elements must be present that fall under sections a-e of Article II of the treaty. They include:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group (1951).

The final inclusion of "forcibly transferring children of the group to another group" is the only remainder of Article III left in the treaty. While Lemkin discussed the removal of children under the cultural aspect of the term, it was permitted to stay in the U.N definition only by re-conceptualizing it as either a physical or biological act of genocide (Nersessian, 2005). This was largely due to the efforts of John Maktos, a U.S. delegate who reframed the forceful transferring of children by asking the convention committee "what difference was there from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth" (Quoted in Van Krieken, 2008: 78). This justified the act as physical or perhaps even biological in nature and thus was deemed within the limits of the convention's new and exclusive prerogative. However, limiting the U.N. definition of genocide to only those actions that can be framed as physical or biological manifestations is fundamentally wrong. It speaks volumes that Lemkin, the main theorist behind the concept, felt it was wrong to exclude certain aspects of the crime. Lamenting the exclusion of cultural genocide, he stated:

> I defended [Article III] through two drafts. It meant the destruction of the cultural pattern of a group, such as the language, the traditions, the monuments, archives, libraries, churches. In brief: the shrines of the soul of a nation. But there was not enough support for this idea in the Committee so with a heavy heart I decided not to press for it (Quoted in Short, 2010: 839).

The limited definition not only goes against the very concept proposed by Lemkin, where cultural genocide played a large part of the concept in its entirety, but also ignores the proposition that physical and biological genocide are just two of many methods to achieve the extermination of a peoples. It is inadequate to propose that only certain techniques of genocide deserve to be protected under international law, while actions other than mass killings can just as effectively destroy a group's existence. The destruction of a peoples can also take place indirectly, through the attack of cultural institutions and practices – essentially the erosion of collective existence (Short, 2010: 840). It is the process of demoralizing a peoples, breaking down their way of life, and making them vulnerable to the dominant group's actions. This process can take place not with the intent to assimilate the individuals into a greater culture, but with the end goal of slowly destroying the group

and allowing it and its members to become extinct (Nersessian, 2005). The possibilities of cultural genocide as an effective form of annihilation was recognized by Judge Shahabuddeen during the genocide tribunals for the former Yugoslavia when he noted that "[t]he intent certainly has to be to destroy, but…there is no reason why the destruction must always be physical or biological" (Van Herik, 2007: 83). The Trial Chamber in the Blagojevic case also recognized cultural genocide's possibilities, as they stated, "[w]hile killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group" (Van Herik, 2007: 84).

Furthermore, it can be argued that cultural genocide cannot easily be separated from its other manifestations. While physical, biological, and cultural actions are separate dimensions of genocide, it is only in their entirety that they collectively form the concept in its whole (Van Krieken, 2008: 77). The different dimensions are fundamentally linked as they are part of the same concept, and examining genocide through the lens of only a single dimension cannot accurately represent the situation at hand. The interconnected nature of cultural genocide with more physical forms is only further solidified as the former is usually an early indication of the latter (Short, 2010: 840). This has not only been observed by academics but also judges partaking in the international criminal tribunals. The Trial Chamber in the former-Yugoslavia noted that "[w]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the target group as well" (Quoted in Van Herik, 2007: 82). This not only demonstrates the linked relationship between cultural genocide and its counterparts, but also begs the question: must we wait until cultural suppression turns bloody before anything can be done to curtail the destruction (Davidson, 2012: 131).

This returns to the initial debate over the inclusion of cultural genocide under international law. It has been noted by courts in recent tribunals that the dimension is both an effective method of destroying a peoples as well as intricately entwined with other forms of genocide. It not only is present in most cases of ethnic targeting but is also highly conclusive in establishing mass killings based on ethnicity. Yet delegates forming the U.N. treaty held the opinion that cultural genocide was not a severe enough crime to be included in their convention as it would detract from the serious nature of physical and biological genocide. This is a concern often brought up when cultural genocide is mentioned: the idea that its use trivializes mass killings and erodes the term's 'normative and evocative' strength (Sautman, 2006: 23-4). This opinion, however, is often borne of a misunderstanding of cultural genocide and confusion with similar concepts such as globalization or assimilation (Short, 2010: 841-2). These latter terms refer to changes in culture that can occur naturally or purposefully due to dominating societies and ideas. While these practices are of concern, they do no merit the same kind of alarm that cultural genocide should, as their aim is to *incorporate* the group into a larger collective (Sautman, 2006: 6). Cultural genocide differs from these, in that it is purposeful with the intent to *destroy* a peoples; the fundamental aspects of a group's unique culture are attacked with the aim to eradicate the group (Nersessian, 2005). Their eventual demise is the end-goal: "the deliberate destruction and desecration of culture… leaves little doubt there is an intent to both physically exterminate the group and eliminate all remnants of its existence" (Sautman, 2006: 6).

With Lemkin having played such an intimate role in the U.N. creation of the treaty, it would be surprising if this distinction was not made at some point throughout the discussions. This leads to speculations that perhaps there were further reasons Article III of the Convention was omitted in the final stages of the draft. A strong argument for this would be the political nuances of officially condemning cultural genocide on the international stage (Mako, 2012: 176). In 1948, many UN countries were guilty of some form of ethnic suppression either in their recent past or in their current colonies (Sautman, 2006: 6). In the United States, a strong case can be made that Native Americans faced a full-fledged cultural genocide (Davidson, 2012: 124); the British and French colonialists could also be accused. In addition, it was noted that Sweden and Canada were nervous about ratifying a treaty that recognized cultural and ethnic rights as they were both struggling with minority problems at the time (Sautman, 2006: 6). The definition was likely narrowed, not purely due to moral and pragmatic reasons, but instead to quell the concerns of powerful nations that the treaty could be used against them under international law. Suggesting it be covered under other instruments such as human right's protection was a political diversion, justified by divorcing the concept of cultural genocide from the definition of genocide itself.

Protection against cultural genocide has not been sufficiently provided under other international instruments (Nersessian, 2005). While human rights declarations have addressed similar and related issues, cultural genocide has yet been recognized as a serious offence under international law. Even if it is adopted into human rights and social

doctrines, these documents cannot provide the necessary clout to properly prohibit the practice (Sautman, 2006: 9). What is necessary, then, is its recognition in an international treaty, which can provide the legal basis to hold individuals responsible for the crime and establish enforcement capabilities (Davidson, 2012: 128). Without this, violators will not face any serious repercussions and cultural genocide will continue to be the forgotten component of the crime: the condoned method of eliminating an ethnic group. Unfortunately, it is unlikely this will take place in the foreseeable future. The political interests of powerful states have not lessened in the past seventy years, and they continue to oppose the recognition of cultural genocide as a serious crime equal to that of physical or biological destruction. Even if a treaty was created, it is unlikely many states would ratify it, as the possibility of genocidal accusations, even on the grounds of culture, carries a heavy stigma (Davidson, 2012: 128).

The omission of cultural genocide from international law is lamentable. It is clear after reading Lemkin's postulations, that it is a central component of the general concept of genocide, and that its omission from the U.N. definition was an inaccurate alteration. Not only is it a method of eliminating an ethnic group, it is irrevocably tied to other dimensions of genocide that will be misunderstood without the former's inclusion. Furthermore, it is wrong to consider the recognition of cultural genocide as trivializing its physical and biological counterparts, as prohibition under international law is not a zero-sum game. Banning attacks on culture does not take away from the illegality of mass killings; it only further enshrines the principles originally held. The omission of a prohibition on cultural genocide under international law is a moral wrong, perpetuated by political actors whose interests lie in avoiding responsibility and separating the concept from its true label as genocide. ■

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# The Impact of our Judicial System upon Canadian Federalism

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Political Science 2800: Introduction to Canadian Politics and Government

**Thesis**

Judicial decisions have had a major impact upon Canadian federalism. The judgments and opinions of the Judicial Committee of the Privy Council decentralized Canadian federalism by limiting the powers of the federal government and reinforcing provincial power. The Supreme Court of Canada has increased the powers of the federal government leading to a more centralizing impact upon Canadian federalism.

**Introduction - Division of Powers**

The sections of the Canadian constitution that define the powers which are within federal and provincial jurisdiction are sections 91 and 92 of the British North America Act (BNA), 1867. Section 91 specifically enumerates 29 areas that are exclusively within federal jurisdiction and also confers upon the federal government jurisdiction to enact laws for the Peace, Order and Good Government (POGG). The Courts have determined that the POGG power may only be exercised in certain extenuating circumstances. The second enumerated federal power in s.91, namely s.91(2), provides the right to make laws regarding the regulation of trade and commerce. Section 92 enumerates 16 areas that are exclusively within provincial jurisdiction. The thirteenth provincial power, s.92(13), confers jurisdiction over property and civil rights. Most rulings of the Judicial Committee of the Privy Council (JCPC) on the POGG clause have limited the powers this clause confers on the federal government. In contrast the JCPC expansively interpreted s.92(13) property and civil rights while narrowly interpreting the federal powers regarding trade and commerce. By rendering an expansive interpretation of s. 92(13) the JCPC effectively limited the extent to which s. 91(2) could be used to encroach upon provincial jurisdiction with respect to property and civil rights. When the Supreme Court of Canada (SCC) dealt with sections 91 and 92 the decisions of that Court reflected a more centralized approach to federalism. The opinions of the SCC pertaining to the Patriation and Secession reference cases also had a profound centralizing impact upon Canadian federalism. While not binding, the Court's opinions in such significant reference cases do have a widespread influence on public opinion, policymaking and Canadian federalism.

This paper will deal with the POGG power, s.91(2), s.92(13) and two SCC landmark reference cases to assess the impact of judicial decisions on Canadian federalism. We will see that the jurisprudence of the JCPC had a decentralizing impact on Canadian federalism and that the SCC jurisprudence has had a more centralizing impact.

**Peace Order and Good Government Cases**

**Board of Commerce Case - Emergency Doctrine of POGG**

In 1919 the federal government created the Board of Commerce to prohibit profiteering and other illegal business practices. The Board questioned its authority to make orders and compel a provincial court to enforce them.

These questions were referred to the JCPC for an opinion. Writing for the JCPC Lord Haldane said, "the validity of this order depended on whether the Parliament of Canada had legislative capacity, under the British North America Act of 1867, to establish the Board and give it the authority to make the order."[1] The JCPC effectively struck down the legislation declaring it to be ultra vires the Parliament of Canada (beyond their powers). Lord Haldane went further by saying that the POGG power should only be used in times of emergency. "It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperiled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either Section 92 or Section 91 itself."[2] This case effectively limited the POGG power to be used only in emergency situations and subsequently gave rise to the emergency doctrine that is still in force today. This precedent that the POGG power could not be used for anything other than a situation that constituted an emergency held for over twenty years until the doctrine of national concern was formally developed by the *Privy Council in Attorney General of Ontario v. Canada Temperance Federation* [1946]. Depending on the specific circumstances either the emergency doctrine or the national concern doctrine may prevail.

***Attorney General of Ontario v. Canada Temperance Federation* - National Concern doctrine of POGG**

The Ontario government appealed a decision of the Court of Appeal of Ontario regarding the *Canada Temperance Act* to the JCPC. In *Attorney General v. Canada Temperance Federation* [1946] the JCPC established the national concern doctrine. Under this doctrine the federal government could invoke the POGG power to address issues of a national concern: issues that extend beyond just a local or provincial concern. This JCPC judgment supported a more centralized approach to federalism than it had previously held. The doctrine of 'national concern' continues to be a major guiding principle of the SCC in their interpretation of the POGG power.

**Depression Recovery Cases - Not a national emergency?**

To facilitate recovery from the Great Depression, the federal government attempted to stimulate the economy and enacted "a series of statutes designed to effect far-reaching social and economic reforms."[3] The issue of whether these statutes were within federal jurisdiction under the POGG power was adjudicated by the JCPC. It held that most of these statutes were ultra vires the Parliament of Canada on the basis that some of them interfered with provincial jurisdiction, namely s.92(13) while others could only be enacted in an emergency. Although different in nature, the JCPC found that six out of eight statutes were not within federal jurisdiction. The effect of these JCPC decisions was in favor of decentralized federalism.

**Anti-Inflation Reference - A national emergency?**

There had been a period of substantial inflation in the 1970s. In 1975 the federal government passed the *Anti-Inflation Act* which regulated among other things: wages, price of goods and fees.[4] The federal government made a reference to the SCC to determine if the *Act* was constitutional. The *Reference re Anti-Inflation Act* highlighted the conflicting views held by the SCC and JCPC regarding economic emergencies and how the emergency doctrine could be applied. Despite the fact that the JCPC struck down most of the Great Depression statutes in the 1930s, the SCC found that growing inflation did rise to the level of an economic emergency. The SCC found the Act to be constitutional under the emergency doctrine of the POGG power. The change in outlook between the JCPC and the SCC is perhaps best stated in the words of Chief Justice Laskin and the subsequent evaluation of those words by Professor Hogg. Laskin C.J. held that the court "would be unjustified in concluding, on the submissions in this case and on all material put before it, that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperiling the well-being of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole."[5]

Hogg referred to the factum[6] of the Canadian Labour Congress. The factum relied upon a study by well known Canadian economist Richard G. Lipsey. Lipsey asserted that the current period of increased inflation was not particularly serious in its effects upon living standards. Thirty eight other economists agreed with Lipsey's conclusions. Hogg went so far as to say that this evidence "was agreed upon by a substantial section of Canadian professional economic opinion."[7] Despite this evidence he notes that as a result of the statement made by Laskin C.J. it was sufficient for the SCC to find that there was a "rational basis" for a finding that an emergency existed.[8] Hogg continues, stating that it is not up to the proponents of the legislation to prove that this "rational basis" exists but that "it is for the opponents of the legislation to establish the absence of a 'rational basis'" that such an emergency exists. He concludes that this means that the federal Parliament can use the emergency doctrine of the POGG power almost at will.[9]

Chief Justice Laskin's intimation in his statement above "carefully disclaims any judicial duty to make a definitive finding that an emergency exists."[10] This judicial position effectively places an onus on those opposing the legislation to establish the absence of a rational basis for the decision by Parliament. In so doing the SCC expanded the emergency doctrine of the POGG power in a manner that had a centralizing effect upon Canadian federalism.

Judicial restraint[11] is appropriate in most circumstances to allow a duly elected Parliament to govern. However, the Courts in a constitutional federal democracy have to place limits upon the exercise of an expansive federal power in the nature of POGG. This exercise should go beyond a passive acceptance of an assertion by Parliament claiming the existing of an emergency that justifies a particular federal legislative response.

While the measures taken in this case may have been temporarily necessary to deal with such levels of inflation, the case has set a centralizing legal precedent regarding when the federal Parliament can use the emergency doctrine of the POGG power. It is interesting to note that double-digit inflation also occurred in Canada during the early 1980s but the federal Parliament "chose not to exercise the vast emergency powers which it had presumably acquired"[12] as a result of the Anti-Inflation reference. This brings into some question whether such a rise in inflation is an actual emergency which justifies the invocation of specific legislative measures under the emergency doctrine.

While the powers of the emergency doctrine have not since been invoked by the federal Parliament, the Anti-

Inflation Reference precedent has made it more difficult for Courts to invalidate future federal legislation invoked under the emergency doctrine.

**Trade and Commerce Cases**

***Citizen's Insurance Co. v. Parsons* - A decentralizing start**

In the 1881 decision of *Citizen's Insurance Company of Canada v. Parsons* the JCPC considered whether a province had legal authority to pass a statute requiring that certain conditions be included in all fire insurance policies. Sir Montague Smith defined the scope of the trade and commerce power in s.91(2) saying:

> The words 'regulation of trade and commerce,' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring the power on the dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary...Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.[13]

The *Parsons* case resulted in a definition of the federal government's trade and commerce powers as being restricted to:[14]

1) Interprovincial trade or international trade and commerce and,
2) General trade and commerce affecting the whole dominion

This case restricted the federal government regulation of trade and commerce. It also created the foundation for judicial recognition of extensive provincial powers under s.92(13). Parsons is a landmark decision. In this case the JCPC effectively recognized the provinces as having a nearly unlimited power to over intraprovincial trade.[15]

***Caloil Inc. v. Attorney General of Canada* - A new interpretation**

The SCC in *Caloil Inc. v. Attorney General* [1971][16] upheld the National Energy Board Act which regulated the importation and sale of imported oil.

While this statute certainly seemed to encroach upon intraprovincial trade, the law was upheld by the Court. Justice Pigeon stated:

> It is clear, therefore, that the existence and extent of provincial regulatory authority over specific trades within the province is not the sole criterion to be considered in deciding whether a federal regulation affecting such a trade is invalid. On the contrary, it is no objection when the impugned enactment is an integral part of a scheme for the regulation of international or interprovincial trade, a purpose that is clearly outside provincial jurisdiction and within the exclusive federal field of action.[17]

This centralized approach to federalism was a significant retrenchment from what the JCPC had ruled in *Parsons*.

**Reference Cases - Regarding Patriation and Secession**

**Patriation Reference - Federal Unilateral Rights**

During the 1980s Prime Minister Trudeau wanted to patriate the constitution of Canada. Several questions were referred to the SCC by various provinces. The SCC formulated two questions.

The first question was how would "federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?"[18] The second question was: did the federal government have the legal power to unilaterally obtain patriation of the constitution; and, if so, whether there was a constitutional convention that required the provinces consent.

The Court held that the federal government could legally modify or amend the constitution unilaterally without the consent of the provinces. Because the second part of the second question was political, not legal, the court was not compelled to answer. However, the court opted to respond and commented that the federal government required a "substantial degree of provincial consent"[19] before making any such modifications or amendments to the constitution.

Hogg notes that this decision "made it impossible for the federal government to proceed with its constitutional proposals without a 'substantial degree' of provincial consent."[20] Political exigencies required the federal government

to act in concert with the provinces regarding these proposed changes. Following this decision, the federal and provincial governments sought agreement on the amendments to the constitution and to the adoption of the *Canadian Charter of Rights and Freedoms*. An agreement was reached between the federal government and all of provincial governments with the exception of Quebec. The *Constitution Act*, 1982 (which included the *Charter of Rights*) was signed by the Queen on April 17, 1982.

The SCC's decision that the federal government could legally, unilaterally request the U.K. Parliament to amend the Canadian constitution, with the resultant profound impacts upon the democratic framework of Canada, had striking centralist implications. However, the Court's expressed opinion and the political reality that a 'substantial degree of provincial consent' was required, resulted in constitutional negotiations between the federal and provincial governments to achieve a national consensus. No province had the power to veto in such negotiations.[21] While the patriation of the constitution was successful, the failure of the federal and other provincial governments to acquire Quebec's consent to the patriation has led to considerable turmoil between Quebec and Anglo-Canada.

Such difficulties, combined with language and culture concerns felt by a sizable portion of the Quebec population, culminated in a second referendum regarding secession from Canada in 1995.

**Reference Re Secession of Quebec**

In 1980 and 1995 Quebec held referenda on the question of unilateral secession by Quebec. The yes vote received 40 percent in 1980. The yes vote increased to 49.4% in the second referendum. This development had enormous constitutional, legal, political and international implications for the future of Canada should another referendum result in a majority of Quebecers voting in favor of independence. Realizing the importance of the matter the Governor in Council (Cabinet) requested that the SCC give an advisory opinion with respect to the following questions:[22]

1. Can Quebec secede unilaterally under the Constitution of Canada?
2. Can Quebec secede unilaterally under international law? Does international law pertaining to self-determination principles give Quebec the right to secede unilaterally?
3. If answers to question 1 and 2 are in conflict, which would take precedence in Canada?

In *Reference re Secession of Quebec*, [1998] Court decided on the first question that unilateral secession was not permissible stating:

> Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.[23]

On the second question the Court concluded that self-determination principles did not confer the right to unilaterally secede:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.[24]

The Court declined to answer the third question as it was unnecessary to do so.

The Court stated secession could only occur through a constitutional amendment. The Court's opinion and recommendations obliged the provincial and federal governments to negotiate an appropriate resolution should an individual province show a clear provincial majority desire for secession. This approach of co-operative federalism, rather than supporting the unilateral action by an individual province, demonstrates that the Courts can have a profoundly strong centralizing impact upon Canadian federalism.

Through these reference cases the SCC has laid out the role of the provinces and the federal government within the political framework of Canada in a manner that supports a centralized view of Canadian federalism.

**Conclusions**

The JCPC and the SCC have had very different impacts upon Canadian federalism. The decisions of the JCPC recognized broad powers of the provincial governments under the division of powers sections in the BNA Act and interpreted federal powers (notably trade and commerce and POGG) narrowly. In contrast, the JCPC expansively interpreted s.92(13) with a broad conception of property and civil rights. The JCPC did however develop the national concern doctrine which had the effect of centralizing power.

More recently the SCC has interpreted s.91(2) more expansively which has limited the provincial powers of s.92(13) with regard to trade and commerce.

The Patriation and Secession references of the SCC, had a strong centralizing effect. These decisions have emphasized 'One Canada' - we are first of all Canadians.

Many of the JCPC judgements expanded provincial power while contracting federal power leading to a very decentralized role in the history of Canadian federalism. However, just before the JCPC ceased to be Canada's highest court of appeal the JCPC did rule in favor of the federal government more than it had in previous decades. Canada abolished all appeals to the JCPC in 1949. Since then the law has evolved through the jurisprudence of the SCC to have a much more centralizing impact upon Canadian federalism.

It is not the role of Justices of a court to attempt to redefine federalism. However it is not surprising that the Courts have had to define federalism in significant judgements that have impacted society and politics. ■

**Endnotes:**

[1] The *Attorney General of Canada v. The Attorney General of Alberta and others (Canada)* [1921] UKPC 107. pg. 2

[2] T*he Attorney General of Canada v. The Attorney General of Alberta and others (Canada)* [1921] UKPC 107. pg. 6

[3] Hogg, Peter W. *Constitutional Law of Canada.* 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.17 pg.21

[4] *Anti-Inflation Act*, 1975 (Can.), c. 75. Citation from www.scc-csc.lexum.com as of December 19, 2013.

[5] Reference re *Anti-Inflation Act* [1976] 2 S.C.R. 373 pgs. 373, 425.

[6] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.17 pg.26

[7] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.17 pg.27

[8] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.17 pg.27

[9] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.17 pg.27

[10] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch. 17 pg. 26

[11] *Citizen's Insurance Co. v. Parsons* [1881] UKPC 49

[12] *Constitutional Law of Canada*. 2012 Student Edition. Ch.20. pg.2

[13] *Caloil Inc. v. Attorney General* [1971] S.C.R. 543

[14] *Caloil Inc. v. Attorney General* [1971] S.C.R. 543

[15] Reference re a Resolution to amend the Constitution [1981] 1 S.C.R. 753. pg. 756

[16] Reference re a Resolution to amend the Constitution [1981] 1 S.C.R. 753. pg. 905

[17] Hogg, Peter W. *Constitutional Law of Canada*. 2012 Student Edition. Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2012. Ch.1 pg. 23

[18] Referring here to the Quebec Veto Reference [1982] 2 S.C.R. 793 where the SCC determined that Quebec did not have a veto to any constitutional amendments or the patriation of the constitution.

[19] Reference re Secession of Quebec [1998] 2 S.C.R. 217

[20] Reference re Secession of Quebec [1998] 2 S.C.R. 217. Section with the SCC's answer to question 1

[21] Reference re Secession of Quebec [1998] 2 S.C.R. 217. para. 154

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*Citizen's Insurance Co. v. Parsons* [1881] UKPC 49

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