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Foreword

The Canadian Institute for the Administration of Justice hosted a national Conference on *Participatory Justice in a Global Economy: The New Rule of Law?* in Banff, Alberta, from October 16th to the 18th, 2003. The Co-Chairs for the Conference were Dean Patricia Hughes from the Law School of the University of Calgary, the Honourable Justice Rosemary Nation from the Court of Queen's Bench of Alberta and Mr. Michael I. Wylie from Macleod Dixon LLP in Calgary. The Honourable Justice Constance D. Hunt from the Alberta Court of Appeal, Professor L. Philip Bryden from the Faculty of Law of the University of British Columbia, Professor Patrick A. Molinari from the Faculty of Law of the Université de Montréal and Ms. Christine Huglo Robertson, Executive Director of the Canadian Institute for the Administration of Justice were also members of the Planning Committee.

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Sincere thanks are due to Ms. Lise Cummings and Ms. Mary Plagakis for preparing the material for publication.

Préface

L'Institut canadien d'administration de la justice tenait du 16 au 18 octobre 2003 à Banff (Alberta) son congrès annuel sur le thème *Une justice de participation dans une économie globale : la nouvelle règle de droit*. Ce congrès était coprésidé par la doyenne Patricia Hughes de la Faculté de droit de l'Université de Calgary, la juge Rosemary Nation de la Cour du Banc de la Reine de l'Alberta et M^{e} Michael I. Wylie de Macleod Dixon à Calgary. La juge Constance D. Hunt de la Cour d'appel de l'Alberta, le professeur Philip L. Bryden de la Faculté de droit de l'Université de Colombie-Britannique, le professeur Patrick A. Molinari de la Faculté de droit de l'Université de Montréal et Mme Christine Huglo Robertson, directrice générale de l'Institut canadien d'administration de la justice faisaient aussi partie du comité d'organisation.

La publication des actes de cette conférence a été rendue possible en partie grâce à la générosité des organismes suivants:

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Ces organismes n'accordent aucune approbation ou improbation aux opinions émises par les auteurs des textes qui suivent; ces opinions doivent être considérées comme propres à leurs auteurs.

Des remerciements sincères s'adressent à Mme Lise Cummings et Mlle Mary Plagakis pour la préparation du matériel publié.

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Some Legal Badges of Economic Globalization from Rome to the WTO and Regional Trade Agreements

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I wish to thank Barbara Zeller, law student at the University of Victoria, for her help in preparing this paper. Any errors, omissions or other deficiencies are my responsibility.

This is a short paper about a very long topic. As often as the term "globalization" is used in our daily speech, there remains a considerable difference of opinion over its meaning and significance for our economic, social, political and legal development.

In the words of one observer,

> "Everyone here is on all sides these days about globalization and its effects… the word is somewhat odd. It names both a process and a *fait accompli*. Globalization is at once something that has already happened and something that is happening now, perhaps with a distant horizon to its completion… Even the most insular and hermetically sealed nation has always been, to some degree, affected by international trade and by other influences coming from the outside, as in the ancient Muslim influence on China, not to speak of the importation of Buddhism into China. Nevertheless, everyone feels that the process of globalization has these days reached a hyperbolic stage. This justifies singling it out as a decisive factor in many realms of cultural, political and economic life."[1]

As an economic concept, "globalization" was probably first popularized by Klans Schwab and his World Economic Forum meeting in Davos some ten years ago.[2] Fred Bergsten, writing in *The Economist*, simply defined globalization as "international economic integration".[3]

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1 J. Hillis Miller, "Effects of Globalization on Literary Study" in Kwok-kan Tam et al., *Sights of Contestation: Localism, Globalism and Cultural Production in Asia and the Pacific* (Hong Kong: The Chinese University Press, 2002) 311.

2 B.D. Wood, "The Globalization Question" Encyclopedia Britannica online: http://search-eb.com/magazine/article?query=globalization&id=5&smode=3.

3 C.F. Bergsten, "The Rationale for a Rosy View: What a Global Economy Will Look Like" *The Economist* (September 11, 1993).

There are three positions in the debate over the meaning of globalization, neatly summarized as *radical, transformational and historical*:

> "[T]heoretical approaches differ markedly as to whether the present-day phase of globalization is believed to articulate a radically new epoch in world history, a process of transformation or a restructuring of the global political economy, or a historically contingent phenomenon that is by no means unprecedented."[4]

Thomas Friedman is an example of the popular combination of the first and second of those views. He describes globalization as "a dynamic, ongoing process… the inexorable integration of markets, nation-states and technologies to a degree never witnessed before."[5] Friedman argues that the marketplace and its "immovable passenger" capitalism drive the process of globalization with the result that "… globalization also has its own set of rules—rules that revolve around opening, deregulating and privatizing your economy, in order to make it more competitive and attractive to foreign investment."[6]

Joseph Nye and John Donahue argue a process along the lines of the third, historical position. They speak of "globalism as a phenomenon with ancient roots and of globalization as the process of increasing globalism".[7] They focus on how *thick* or *thin* the process of globalization has been over time. The thickness of the process relates to the extensiveness, intensity, and impact of relationships created by globalism. The greater the intensity, the thicker the process of globalization.

This paper follows Nye and Donahue along the third historical school of thought, but focuses on the more specific relationship between economics and law, assuming a definition that is less Western-focussed and less limited by time than Friedman's globalization. In opposition to the popular belief that globalization is a recent phenomenon stretching

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4 A.G. McGrew, "Global Legal Interaction and Present-Day Patterns of Globalization" in V. Gessner & A.C. Budak, eds., *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Brookfield: Ashgate Publishing, 1998) 325 at 326.

5 T.L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization*, 2nd ed. (New York: Farrar, Staus and Giroux, 2000) at 9.

6 *Ibid*.

7 J.S. Nye & J.D. Donahue, eds., *Governance in a Globalizing World* (Washington, D.C.: Brookings Institution Press, 2000) at 7.

back some hundred years, I posit that globalization, as a method and process by which market-driven economies have shifted laws and customs to facilitate economic development, has existed with varying influence and force since the earliest days of regional and international trade. The present stage of globalization[8] may be in our face, so to speak, but its antecedents in law and practice have been with us for centuries.

My proposed approach is not meant to marginalize or minimize the sharp differences of opinion over the meaning and effect of globalization. For economist John Helliwell, globalization "seems as much hype as reality", a conclusion which he admits "has an almost other-worldly air when juxtaposed with the debates and protests about globalization."[9] On one end of the spectrum, the *globaphiles* cannot see beyond the mantra of open universal markets and minimalist government as the key to higher living standards around the world. By comparison,[10] the *globophobes*

> "regard globalization as the tool multinational corporations are using to rob the world's poor by exploiting their labour, resources and environments; destroying their culture; and commanding their vassal governments to implement whatever laws and trade agreements would make these transfers easier to achieve."[11]

I do not plan here, to enter into another round of globalization trench warfare, however. Others have written and proselytized widely on the subject.[12] Rather, I will focus on thinking through the range and diversity of law and commercial practice that have created over time an amazingly durable, yet flexible and ever-changing legal framework for transactions between highly interdependent states in our "global village".[13]

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8 Derided by some as "Coca-Colonization" or "McMarketization".

9 J.R. Helliwell, *Globalization and Well-Being* (Vancouver: UBC Press, 2002) at 15-17, 77-78.

10 G. Burtless et al., *Globaphobia: Confronting Fears About Open Trade* (Washington, D.C.: Brookings Institution Press, 1998); P. Legrain, *Open World: The Truth About Globalization* (London: Abacus, 2002).

11 *Supra* note 9 at 78.

12 For example, see J.E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2002); F.J. Lechner & J. Boli, eds., *The Globalization Reader* (Malden: Blackwell, 2000).

13 E. Carpenter & M. McLuhan, eds., *Explorations in Communication* (Boston: Beacon Press, 1960) at xi.

I. CLASSIFYING TRANSBORDER LEGAL CHANGE WAVES

While globalization may be a "contested concept", if we think of the term in its meaning for the flow of capital, people, goods and services and information across national borders, "we would be hard-pressed to deny [its] historical antecedents."[14] The legal badges or indicia of globalization are located in three merging waves of legal change, namely, the *unification*, *convergence* and *harmonization* of national legislative frameworks. Their cumulative effect underscores the evolutionary *thin* to *thick* process of legal regionalism and legal globalism that continues to the present day in the legal ordering of the global economy.

Unification happens when nation states approve a treaty or convention that invites the signatories to adopt unchanged the instrument as domestic law with full force and effect in their legal systems. The cumulative experience results in the acceptance of identical rules across the board. A relevant example would be the UNIDROIT Convention on the Uniform Law on the International Sale of Goods of 1964.[15] Another example is the UNCITRAL 1985 Model Law for International Commercial Arbitration,[16] which establishes a uniform legal framework for arbitration proceedings[17] and, in addition, has had "a unifying effect on new arbitration legislation in countries which did not even adopt the model law, as for example, in the case of the English Arbitration Act of 1996".[18]

Convergence of laws, on the other hand, takes place when nation states, beginning from different legal entry points, bring their laws by coordinated efforts closer together in terms of coverage, impact and administration. Membership in regional trading groups[19] and customs unions,[20] in the case of national commercial legislation and administration,

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[14] P. Potter, "Introduction: Globalization and Social Cohesion in Local Context" (2003) at 2 [unpublished, on file with author].

[15] R. Goode, *Commercial Law*, 2nd ed. (Harmondsworth: Penguin, 1995) at 17-18.

[16] *United Nations Commission on International Trade Law* (UNCITRAL), http://www.uncitral.org/en-index.htm.

[17] F. von Schlabrendorff, "Resolving Cultural Differences in Arbitration Proceedings" (2002) March supp. International Financial L. Rev. 38.

[18] P. Sanders, "UNCITRAL's Model Law on Conciliation," (2002) 12 Int'l J of Dispute Settlement 1.

[19] NAFTA is one example.

[20] The European Union is an obvious example.

has accelerated the convergence of member states' legislation. The result has advanced the emergence of hybrid or mixed systems of law that have challenged the classical schema of civil and common law legal systems, not to mention the socialist classification of legal systems in transitional economies from Vietnam and China to Russia and Hungary. The forces of economic regionalism and multilateralism have force-fed the pace of legal convergence, requiring new thinking in the classification of legal systems by comparative law scholars.[21]

Harmonization of laws occurs when different nation states use the same templates or sets of precedents as a basic foundation to which local adaptations are crafted to accommodate domestic cultural, economic and social considerations. Earliest examples would include the assumption of Roman law in Europe in the Middle Ages.[22] More recently, the World Trade Organization (WTO) has been the major institution pushing the harmonization of national trade laws and administration through mandatory Uruguay Round side agreements on a range of matters.[23] I will consider this most recent wave of legal globalization later in this paper.

II. EARLY LEGAL REGIONALISM IN ROMAN EMPIRE TERMS

My brief examination of early legal globalism begins with the Romans. The Roman legal regime was the first clearly secular legal system. Under the Roman Empire, diverse populations were brought under a common legal mantle. To make these laws "fit", to have the laws be applicable and enforceable over a broad range of peoples and situations, it was necessary to craft a legal system that would safeguard Rome's primary interests while recognizing local norms and customs that facilitated orderly community relations so long as they did not threaten Rome's governing capacity. Rome practised, if you will, its own version of adaptable Empire Law which, at its zenith, given the state of communications and the regional boundaries of trading activity, was the "globalized" law of its day.

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[21] R. Peerenboom, "The X-Files: Past and Present Portrayals of China's 'Alien Legal System'" (2003) 2 Wash. U. Global Studies Rev. 37.

[22] J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 43-44.

[23] Generally, see J.S. Thomas & M.A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Toronto: Carswell, 1997).

Roman law, for our purposes, is primarily the law of property and contracts. The earliest texts of import in this area are the *Institutes* of Emperor Gaius (circa 161 C.E.) and the *Institutes* of the Emperor Justinian (circa 533 C.E.). The latter is modeled mainly on the former but is more expansive. The *Institutes* dealt with *privatum jus* (private law) though it should be noted that property and contract law in their present day incarnations do not find their precise notional counterparts in either of the Institutes.

Under the rule of Emperor Trajan (98-117 CE), the reach of Rome reached its territorial limits, supporting a commercial web that stretched through much of Europe into the edges of Asia and Africa. The legal system facilitating this commerce was practical, internally coherent and open to the flexible resolution of trade disputes.[24] Originally, only Roman citizens could benefit from Roman law but Emperor Antoninus in 212 CE granted citizenship to all free subjects of the Roman Empire and complications that had plagued the dual foreign law/Roman law system were put to rest.

Though the size of the Empire shrank during Justinian's reign, his four part legal compilation, the *Corpus* (consisting of the *Institutes*, *Digest*, *Codex*, and *Novels*), contributed a classification and coherence to the science of lawmaking that would have far reaching effects. The overriding impression of this early period of prevailing legal norms is consistent with harmonization.

Eight centuries later, legal scholars in Bologna refurbished the *Corpus*, handling the *Corpus* as a Gloss, following a centuries-old practice of annotating a text with marginal notes. Their efforts eventually produced a comprehensive and pertinent legal treatise that served as the foundation for Italian legal study, not only for the academic community, but also for administrators, judges, and advocates.[25]

The "reinvented" *Corpus* began to be adopted and adapted by local regions as its benefits became evident. The *Corpus* was, unlike regional law, a well developed system that had been amassed to deal with a variety of eventualities. Its quality as a written text lent it an air of reliability and

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[24] F. Schulz, *History of Roman Legal Science* (London: Oxford University Press, 1946) at 67-68.

[25] A. Watson, *Roman Law and Comparative Law* (Athens and London: University of Georgia Press, 1991) at 90.

made it available for study and teaching.[26] This in turn meant that regions had the ability to focus on principles and structure so they could pick and choose how and what to apply to their own systems; in this way, "Roman law functioned as a kind of legal treasury for Europe"[27], bringing together a relatively thick convergence of laws throughout many parts of Europe.

III. THE LAW MERCHANT EVOLVES AND PROSPERS

The Roman legal principles in time permeated the borders of today's Spain, Germany, the Netherlands, France and beyond. However, the growth of the nation-state in the fifteenth and sixteenth centuries curbed the spread of reintroduced Roman law. Roman law applied only to the citizens of the new states, forcing out non-citizens to deal with each other using their local customary laws regardless of geographic location.

Previous to the widespread establishment of the (modern) nation state and its propensity to legislate commercial norms and practices, traders and merchants largely governed themselves through the application of the Law Merchant (*Lex Mercatoria*) which formerly stood apart from the local law. While the law merchant is normally studied as a phenomenon of English law, its effect on and connection to foreign trade calls for specific comment. In the words of Roy Goode,[28] "there have been few events more remarkable than the birth and development of the law merchant, which for hundreds of years subsisted as a distinct source of law, administered by its own mercantile courts."

A host of courts—maritime courts, the courts of the Fairs and Burroughs and the Staple Courts in company with other commercial courts of the Middle Ages, "determined disputes not by English domestic law but according to 'the general law of nations' based on mercantile codes and customs… and reflecting international maritime and commercial practice."

Little wonder, then, that these courts and their counterparts elsewhere in Europe became the adjudicators of choice not only for local merchants but foreign traders from all parts of the region, content to have their disputes resolved by tribunals which, though located in one jurisdiction,

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[26] J.J. Wolff, *Roman Law: An Historical Introduction* (Norman: University of Oklahoma Press, 1951) at 191.

[27] Braithwaite & Drahos, *supra* note 22 at 43.

[28] R. Goode, *Commercial Law*, 1st ed. (Harmondsworth: Penguin, 1982) at 31-32.

were conversant with both foreign mercantile usage and the fundamentals of the nascent civil and common law systems. The merchant courts offered speedy adjudicative relief, a common sense attitude towards the proof of facts and had little patience for the technical rules of evidence. Most of all, they possessed an overriding understanding of the argument that the good faith customs of merchants should constitute the prevailing norms that should be interpreted in a broadly uniform fashion. Commercial expectations were to be realized, not frustrated.

The next phase of harmonization took root as more nation states embraced the principal features of the *Lex Mercatoria* through statutes,[29] codes,[30] and the separate establishment of commercial courts[31] (though some merchants still used the courts set up at the seasonal fairs, fearing local discrimination).[32] In broad terms, this state formalization of the Law Merchant ranged between harmonization and convergence, depending on the degree and depth of nation-state adoption of and conformity to the customary commercial norms developed and recognized by the trading firms of their day.

The Law Merchant also developed mechanisms for the safe financing of crossborder transactions. While instruments of exchange had existed for centuries, bills of credit, promissory notes, and bills of exchange were more easily and reliably employed once they were standardized across Europe in the fifteenth century.[33] Besides facilitating trade, these documents introduced and normalized the concept of a paper transfer of an intangible.[34] These documentary innovations eventually led to the acceptance of negotiable instruments, the backbone of international commerce.

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[29] Goode, *supra* note 15 at 4.

[30] H.J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 355.

[31] P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: Hambledon Press, 1988) at 218-219.

[32] L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton: Fred B. Rothman, 1983) at 19.

[33] M.M. Postan, *Medieval Trade and Finan*ce (London: Cambridge University Press, 1973) at 54.

[34] Braithwaite & Drahos, *supra* note 22 at 47.

IV. TRANSPLANTING TRADE AND COMMERCE LAWS INTO THE COLONIES—PACIFIC GLIMPSES

As *Lex Mercatoria*'s reach matured in both customary and statutory form, its formative influence on global trading law norms and practices fed into the transplantation of commercial laws and business norms into the far reaches of the colonial empires established by the English, the Dutch, the Spanish, the Portuguese and the French. The experience in South-East Asia illustrates the transplant phenomenon.

Their imperial forays transplanted their trading and commercial laws and institutions into the colonies sometimes through the medium of state monopolies,[35] often with the explicit goal of insulating the commercial interests of their citizens and business associates in the colony's economy from local law or custom.

France, for example, like other European colonial powers in Southeast Asia, created parallel legal systems in its Indochinese territories, including Vietnam, where

> "a civil law system like that of metropolitan France governed French citizens, Europeans, and others with a substantially similar national law, while the local [Imperial] Code and customary practice continued to govern the indigenous Vietnamese and Chinese."[36]

Similar nationality and (often) race-based economic legislation was developed and used by the Dutch in their Netherlands Indies (Indonesia) colony.[37] The larger picture of colonial legal transplants (often most pronounced in commercial law) would include the experience in British India, Burma, Malaya, Ceylon, Hong Kong and the Philippines.

In this connection, we might capture the flavouring of this era of exported law through the observations of Andrew Harding:

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[35] J. Keay, *The Honourable Company: A History of the British East India Company* (Hammersmith: Harper Collins, 1993).

[36] J. Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis" (1994) 30 Stanford J. of Int'l L. 326 at 329.

[37] C. Coppel, "The Idonesian Chinese as 'Foregin Oriental' in the Netherlands Indies" in T. Lindsey, ed., *Indonesia Law and Society* (Sydney: Federation Press, 1998) 33.

> "The English common law tradition, with a heavy dose of the great Anglo-Indian codes, was imposed in Burma and the Straits Settlements, and later in Malaya, Brunei, Sabah, and Sarawak, while its American cousin became a permanent legal influence throughout the twentieth century in the Philippines. The French civilian tradition was imposed in Indo-China and also, along with German, Swiss and Japanese models, influenced Thailand; and Dutch law was imposed in Indonesia. As a result, all the legal systems of Southeast Asia, even that of Thailand, which was not colonised, have a clearly European-style framework, and all modernised their legal systems and their criminal, civil and *commercial* laws with European-style codes just before or just after the turn of the twentieth century, or a little later."[38]

V. THE MIDDLE KINGDOM'S MODEST CONTRIBUTION TO LEGAL OUTREACH

If we shift from our Eurocentric chronicling of the ebb and flow of commercial law and practice that facilitated trade and investment between fiefdoms, trade fairs, early nation states, and their colonies in South East Asia, can we identify similar evolutionary, accommodating trends in the case of China's customary or formal economic laws?

The answer is not for the lack of an empire. The last dynasty of the Chinese Empire, the Qing (1644-1911), produced and relied upon one of the great legal Codes of human history. The *Qing Code* applied to a territory and a population

> "that was as large or larger than that governed by Roman law, either when it was the law of the Roman Empire, or when it became the dominant law of medieval and modern Europe. In addition to governing China itself, China's legal system formed the basis of the legal systems of those nations which were subject to its influence: Korea, Japan and Vietnam. It was only when Roman law spread out beyond Europe and the Mediterranean that it began to exceed Chinese law in importance."[39]

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[38] A. Harding, "Global Doctrine and Local Knowledge: Law in Southeast Asia" (2002) 51 Int'l and Comp. L. Qtly 35 at 43 (emphasis added).

[39] W.C. Jones, *The Great Qing Code* (Oxford: Clarendon Press, 1994) 1.

In the case of Roman law, as we have seen in our treatment of property and contract relations, law was always looked at from the point of view of the individual and its basic concerns arose from person-to-person relationships. For this reason, Roman Law spoke directly to commercial law which is primarily about the terms of business relations between private parties or "rights-bearers".

In imperial China, however, private rights and business law were "considered only when they directly affected the interests of the Emperor".[40]

This meant, for example, that the regulation of marriage would find expression only in the Code because the stability of marriage and family (the "cell" of society) was essential to social stability and the "cosmic harmony" that were required for the very security of the Empire. To choose a second example, the collection of taxes, the Code spelled out very specific rules (and punishments for breaches thereof), just as in our system today, because tax revenue was the only guarantor of the economic sustainability of the regime.

Torts would be treated together with crimes but very little attention was paid to private matters, with almost no treatment of contracts. Contracts and the settlement of commercial disputes were seen as private questions which were best handled in the community by respected intermediaries, mercantile elders or extended family members. Early comparative law scholars refused to regard these facilitation methods as "law" or "legal rules". As one commentator observed: culturally fixed "categories of Western law did not work"[41] in studying the *Qing Code*.

The export of Chinese law was most explicit in the case of Vietnam which provides the only example of a wholesale adoption of foreign law, in concept and substance in South-East Asia.[42] Vietnam's fifteenth century *Lê Code* mixed *Ming Code* law (1397) with local law and the later *Gia-Long Code* (1812) is considered a replication of the *Qing Code* (1740).

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[40] *Ibid.* at 6.

[41] *Ibid.* at 8.

[42] M.B. Hooker, ed., *The Laws of South-East Asia: The Pre-Modern Texts*, vol. 1 (Vancouver: Butterworths, 1986) 20.

The Vietnamese legal system would undergo another transformation under the colonial grasp of the French, between 1867 and 1954.[43]

As in Europe, the Chinese mercantile and trade guilds were an important source of local rules that governed market entry, labour and product prices and quality standards. The guilds were organized by craft or by trade and place of origin for particular sets of merchants and trades. These largely self-governing entities developed their own organizational and dispute resolution tools because the *Qing code* was mainly silent on commercial matters. The guilds had highly formalized codes of trading practices that, in addition to fixing standards of weight and methods of payment, directed members to take their disputes to the guild leadership for settlement. These directives, as in the European case of the Law Merchant, were often accepted by local magistrates as equivalent to formal law on those rare occasions when the courts became involved in non-state economic disputes.[44]

At the end of the day, the weak Chinese state never had any ideological interest in formalizing commercial custom into formal law.[45] Market regulation was only concerned with security and revenue issues. Villages, trading towns, guilds and extended family units were left to their own devices, in large part, to oversee and mentor the facilitation of business transactions.

This era of formal legal apathy may be contrasted with the recent legislative frenzy undertaken by China in order to satisfy the legal harmonization conditions of WTO membership.[46]

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[43] M.B. Hooker, "Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law" in *French Civil Laws and the Laws of Indo-China* (London: Oxford University Press, 1975).

[44] *Ibid.* at 15-16.

[45] This account in no way seeks to minimalize the separate significance of pre-modern China as the centre of an Asian world economy for over five centuries, addressed by A.G. Frank in his masterful study, *ReOrient: Gobal Economy in the Asian Age* (Berkeley: University of California Press, 1998), unfortunately with little reference to contracting practices, operative dispute resolution mechanisms or the relevance of "legal" rules. See also A.G. Frank, "The World Economic System in Asia Before European Hegemony" (1994) 56 Historian 259.

[46] Over 850 specific legislative change commitments (with timetables for enactment and implementation) were given by China to the WTO. For a review of the more significant undertakings, see Baker & McKenzie, *Guide to China and the WTO* (Hong Kong: Asia Information Associates Ltd., 2002); the relative lack of transparency in

VI. PRIVATE INTERNATIONAL LAW CONVENTIONS AND LAW UNIFICATION ORGANIZATIONS—FORMAL MULTILATERALISM TAKES OVER

First convened in 1893, the Hague Conference on Private International Law (HCPIL) redefined itself by 1955 as a multilateral drafting organization committed to "the progressive unification of the rules of private international law".[47] Through its negotiation and drafting efforts, the legal specialists of its member states successfully negotiated unified approaches to a range of matters affecting international commerce. Perhaps the most recent initiative is the Hague Securities Convention which attempts to resolve conflict of laws issues to ensure in advance the choice of governing law for international securities transactions.[48]

The obvious rationale for the unification approach to legislated globalization is to increase the efficiency and predictability of transborder transactions by the application of uniform standards to commercial dealings. Perhaps one of the most successful instruments in this respect would be the UNCITRAL Convention on the International Sale of Goods. UNCITRAL, the "core legal body of the United Nations system in the field of international trade law", was founded in 1966 and tasked by the General Assembly "to further the progressive harmonization and unification of the law of international trade."[49]

Initially established under the League of Nations, UNIDROIT (the International Institute for the Unification of Private Law) was entrusted from the outset with an ongoing responsibility for "study[ing the] needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States."[50]

China's legal system and its relevance to ensuring China's performance of its accession obligations are discussed in S. Biddulph, "Through a Glass Darkly: China, Transparency and the WTO" (2001) 3 Asian Law 59.

47 http://www.hcch.net/e/event/events/html.

48 *Hague Convention on the Law applicable to Certain Rights in respect of Securities held with an Intermediary*, December 13, 2002.

49 United Nations Commission on International Trade Law.

50 International Institute for the Unification of Private Law, http://www.unidroit.org.

With its 59 current member states, UNIDROIT's original unification of law objectives have been refashioned to legal convergence through the drafting and advocacy of model laws, commercial "best practices" and sector-specific legal guides.

We might also cite the continuing role played by the International Chamber of Commerce (ICC), headquartered in Paris. Founded in 1919 as a global association of corporations, trading interests and business organizations, the ICC now has members from some 130 countries. The ICC has initiated and promoted a number of sets of uniform rules or "best practices" that govern the conduct of transborder business. Interestingly, although these rules are voluntary, they have been widely accepted by banks and merchants, and by more than a few courts of law, thereby becoming recognized commercial norms.[51]

VII. ENTER THE GATT/WTO AS THE GREAT LEGAL GLOBALIZER

Support for the harmonization of commercial laws and practice also flows from the EEC treaty in Article 3 which commits the members of the Customs Union to a "common commercial policy… and the approximation of the laws of Member States to the extent required for the functioning of the common market."[52]

In contrast to the Rome Treaty, the *General Agreement on Tariffs and Trade* (GATT), which serves as the basis for the WTO, fails to mention harmonization of national laws or domestic policies of its members as one of its objectives. Quite to the contrary, the GATT, according to its Preamble, was to contribute to "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[53]

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[51] International Chamber of Commerce, http://www.iccwbo.org. Braithwaite & Drahos, *supra* note 22 at 27-28: "The ICC is an important actor in the globalization of regulation because, in addition to having an interest-group strategy for shaping regulation, for 70 years it has had a private ordering strategy based on recording its members' customary practices and releasing them in the form of model rules and agreements."

[52] *Treaty Establishing the European Economic Community*, March 25, 1957, 298 U.N.T.S. 11, art. 3. See also at 47-49.

[53] *General Agreement on Tariffs and Trade*, 55 U.N.T.S. 194 [hereinafter *GATT*]. The World Trade Organization (WTO) was established, effective January 1994, by the

As a matter of principle, a GATT member state is free to adopt any domestic policy it deems fit so long as the law or policy applies to both domestic and foreign products alike without discriminating against foreign products based on their origin.

How then did the GATT/WTO transform itself into a legal change agent in the past decade? Did it happen overnight or did it come about gradually and in specific steps, following the completion of the 1994 Uruguay Round of negotiations?

Take the case of antidumping and countervailing duties.[54] Antidumping and countervailing duties are an exception to the rule against imposing import duties in excess of a party's bound tariff on a particular product. Abuses of this exceptional protectionist device were rampant in the 1960s, resulting in the negotiation of the 1967 Antidumping Code, then the 1979 Tokyo Round Antidumping Code and ultimately the current Antidumping Agreement[55] during the 1994 Uruguay Round. The 1994 Agreement (which all WTO members are obliged to follow) sets out some thirty pages of what is nothing less than highly detailed commitments and procedural provisions that leave little room for divergent or significantly dissimilar national regulation. The same inclusivity is evident in the countervailing duty section of the separate Subsidies Agreement.[56] Not surprisingly, the WTO Antidumping Agreement has spawned remarkably similar, if not almost identical, antidumping and countervailing duty legislation in most WTO member states.[57]

Marrakesh Agreement Establishing the World Trade Organiszation, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter *Marrakesh Agreement*] The WTO's legal framework includes the GATT and a number of mandatory and voluntary side-agreements, including the mandatory Ag*reement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs), which is discussed below.

[54] I am grateful to A. Reich, "The WTO as a Law-Harmonizing Institution" (2002) [unpublished, with author] for his insights into the legal harmonization influence of the 1994 Uruguay Round mandatory agreements. This is a draft paper kindly provided to me by the author.

[55] *Agreement on Implementation of Article VI of GATT 1994* [hereinafter *1994 Antidumping Agreement*], reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts* (Geneva: WTO, 1995) 168 [hereinafter *Results of the Uruguay Round*].

[56] *Agreement on Subsidies and Countervailing Measures* in *ibid*. 264 at 278.

[57] See J. Miranda, R.A. Torres & M. Ruiz, "The International Use of Antidumping: 1987-1997" (1998) 32 World Trade 5.

The Agreement itself mandates that members' laws, regulations and administrative procedures must conform with the provisions of the Antidumping Agreement.[58] Many developing countries upon their joining the WTO have often just copied the provisions of the Antidumping and Subsidies Agreements and translated them into their own language and adopted them as national law.[59]

In its first year (2002) as a WTO member, China's lawmakers moved at a frenetic pace to set up a framework of laws and regulations at all levels of government to govern trade in goods and services according to the WTO principles of transparency and national treatment. An important number of trade-related laws and regulations were drafted or amended through the State Council (the cabinet) and the National People's Congress. One of the very first measures passed was the first antidumping law and it was used quickly in disputes involving steel imports from Japan, South Korea and Taiwan and chemicals from South Korea, Malaysia and Indonesia. There is considerable evidence that developing country members of the WTO have now caught up to traditional leaders such as Canada, the US and Australia in their employment of WTO-recognized antidumping protectionist legislation.[60]

Within the realm of customs administration, a further example of legislative harmonization on the signatories' laws and procedures may be seen in the Rules of Origin[61] applying to imports. Rules of Origin criteria are used to define where a product is made and are probably the most important part of import administration given their legendary capacity, unless they are uniformly administered, to discriminate unfairly against imports, thereby frustrating the force of the GATT's fundamental Most Favoured Nation rules. Under the terms of the preamble of the Rules of

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58 *1994 Antidumping Agreement*, *supra* note 55, art. 3.

59 For example, see "Vietnam to have antidumping ordinance", Vietnam Business Forum, www.vnbizadmin@vietlinks.net (last modifie: September 15, 2003).

60 "Unfair Protection" *The Economist* 349:8093 (November 7, 1998) 75: "Protectionism is on the rise in a new guise: Anti-dumping cases are multiplying in America, Europe and around the world." Also see *Asian Wall Street Journal*, Weekly Edition, November 22-28, 1999) 4, "'Emerging markets are making use of anti-dumping rules'—explosion of cases in Asian region show US and E.U. that such actions can cut both ways." India initiated the highest number of antidumping investigations in 2002, followed by Thailand, Australia and the US: *Far Eastern Economic Review* (May 15, 2003) 25.

61 *Results of the Uruguay Round*, *supra* note 55 at 241.

Origin Agreement whereby the members confirm their desire to "harmonize and clarify rules of origin", considerable progress has been made in the development of uniform and compatible rules which, if successful, will harmonize this notoriously difficult area of trade legislation and administration.[62]

VIII. THE WTO AND TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)— UNIFICATION BY ANOTHER NAME?

The first European, patent, trademark and copyright laws were simple and based on notions of territoriality, merely recognizing the creator's rights. In the mid-nineteenth century, when copying foreign creations was a matter of course, the argument for protecting creators' 'rights' started to be considered.[63] IP became the subject of bilateral treaties which, in turn, set the foundations for two Conventions—the Paris Convention of 1883 which created a union to protect industrial property and the Berne Convention of 1886 which protected literary and artistic works.[64] The global implications of intellectual property rights eventually led to the founding of the World International Property Organization (WIPO) which today counts 179 nations as member states.[65] This rather benign picture of low key international regulation of IPRs started to change after World War II when developing countries joined the Paris and Berne Conventions. For example, in the 1960s India redesigned its patent law to lower its prescription medicine prices. Instead of granting patents for chemical compounds, India granted patents for the process of creating the pharmaceutical.[66] India also headed an initiative to allow developing countries greater access to copyright materials, a project that took form in the 1967 Stockholm Protocol.

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[62] Ironically, the rapid proliferation of Preferential Trade Agreements (PTAs) in the Asia Pacific region threatens to propel the harmonized Rules of Origin to almost absurd lengths as party states strive to keep non-member goods out of their preferred markets. The Rules of Origin provisions of the recent Japan-Singapore PTA account for 200 of the Agreement's 360 pages: see J. Ravenhill, "The Move to Preferential Trade in the Western Pacific Rim" 69 *Asia Pacific Issues* (June 2003) 4.

[63] B. Sherman, "Remembering and Forgetting: The Birth of Modern Copyright Law" (1995) Intellectual Property J. 1 at 7-10.

[64] Braithwaite & Drahos, *supra* note 22 at 59.

[65] WIPO, http://www.wipo.org/about-wipo/en/overview.html.

[66] Braithwaite & Drahos, *supra* note 22 at 61.

U.S. reactions to these perceived impairments of their corporations' IPRs took the form of a series of amendments to the 1974 Trade Act, including the development of the "301" sanctions to identify nations "abusing" their IPRs. The 301 process in turn put pressure on nations involved in bilateral trade agreements with the US to curb the production and distribution of counterfeit goods and misappropriated US patents. Conflict and negotiation ultimately resulted in the development of the TRIPs Agreement—the *Agreement on Trade-related Aspects of Intellectual Property Rights*, which was concluded as part of the Uruguay Round.[67]

Strictly speaking, TRIPs is not concerned with international trade measures. It speaks directly to domestic laws and policies which under the TRIPs Agreement must comply with TRIPs' mandated minimum standards of legal protection.[68] The requirements are, in fact, more than minimal and invariably reflect the level of intellectual property protection prevailing in industrialized countries. The core of the TRIPs Agreement is the adoption of standards from existing intellectual property treaties that ironically, until recently, were not considered to be "trade-related".

TRIPs is not like the other examples of win-win trade liberalization initiatives tied to harmonized legislation and administration. Put shortly, the TRIPs Agreement does not necessarily benefit countries that are net importers of intellectual property. This applies, in large part, to developing countries.[69] This was understood by the developing countries in 1994 when they signed on to the TRIPs as part of a broader bargain inherent in such broad-based negotiations.[70]

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67 *Results of the Uruguay* Round, *supra* note 55.

68 *Agreement on Trade-related Aspects of Intellectual Property Rights*, April 15, 1994, Marrakesh Agreement Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, art. 1(1) [hereinafter *TRIPs*].

69 M.J. Trebilcock & and R. Howse, The Regulation of International Trade (London: Routledge, 1995) 253.

70 According to Braithwaite & Drahos, *Three tests of US trade policy on intellectual property rights*, http://www.nthposition.com/politics_Drahos.html, developing countries had agreed to TRIPs "in the hope that the US would be content with its standards and the gains it brought to the US economy. It was a naïve hope and it turned out to be one in vain. TRIPs, as we will see, has turned out to be a floor without a ceiling".

Perhaps the TRIPs Agreement "broke the faith" in the multilateral harmonization of national trade law, regulation and administration by its aggravation of the "North-South" divide.

This conclusion arises from recent evidence which suggests that the WTO, in the TRIPs case, may have reached its high-water mark as the primary force for the globalization of economic law. It seems safe to predict that the legislative harmonizers in the short and middle term will be US regional and bilateral trade agreements[71] and law reform templates drafted as the legal conditionalities of the IMF and World Bank financial support and other model legislation drafted by various overseas legal advisory programs heavily influenced by the "free markets" ideology of the "Washington Consensus".[72]

Why has TRIPs tripped up the WTO harmonization momentum? The story starts in late May 2003 when the World Health Organization's Annual Assembly formally endorsed a resolution[73] giving the WHO a central role in advising its 192 member governments on how to ensure that pharmaceutical patent protection policies do not harm public health. Initiated by Brazil, the empowering resolution was adopted by consensus after the US dropped an earlier resolution calling for a strengthening of patent protection to encourage drug innovation.

The WHO resolution calls on its members to adapt their national intellectual property laws to make full use of the provisions in the WTO patent rules that allow countries to give priority to public health and nutrition. The argument that won the day was that, in too many cases, developing countries have adopted patent laws that are more restrictive than necessary to comply with TRIPs. The impetus for the resolution

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[71] Most obviously, the NAFTA precedent, which, *inter alia*, required Mexico in chapter 15 to enact an antitrust law compatible with Canadian and US legislation; the recent US-Vietnam Bilateral Trade Agreement committed the Vietnamese to massive legal change which, in several instances, went beyond their forthcoming WTO legal obligations (Vietnam is not expected to join the WTO until 2005). Compare Ravenhill, on "The Move to Preferential Trade in the Western Pacific Rim", *supra* note 62.

[72] W.A.W. Neilson, "The Rush to Law: IMF Legal Conditionalities Meet Indonesia's Legal Realities" in Duncan & Lindsey, eds., *Indonesia After Soeharto: Reformasi and Reaction* (Victoria: Centre for Asia-Pacific Initiatives, 1999) 4. See P. Hughes's paper in this volume for a fulsome analysis of the "Washington Consensus" and its impact on legal change agendas in recipient states.

[73] For context, see WTO/WHO Joint Study, 2002.

undoubtedly came from the September 2002 report of the Independent Commission on Intellectual Property Rights entitled "Integrating Intellectual Property Rights and Development Policy."[74] The central message of the Commission's report

> "is both clear and controversial: poor places should avoid committing themselves to rich-world systems of IPR protection unless such systems are beneficial to their needs. Nor should rich countries, which professed so much interest in 'sustainable development' at the recent Summit in Johannesburg, push for anything stronger."

The impact of IPR on poor nations has centred on the issue of access to expensive patent medicines produced by multinationals in the industrialized world. Developing country members of the WTO at the November 2002 Doha meetings[75] presented the case for the primacy of public health over IPR, demanding that the world's least-developed countries should be given at least until 2016 to introduce patent protection for pharmaceuticals.

In May 2003, the "Cheap Medicine Agreement" was negotiated after frenetic bargaining amidst an openness that rarely attends WTO negotiations.[76] The Agreement will permit WTO members facing public health crises such as HIV/AIDS, malaria or tuberculosis to import the needed medicines from other countries that authorized the manufacturing of generic drugs. To make the purchase, the soliciting country, with some exceptions, will be subject to oversight and approval by the WTO Secretariat and its Council on TRIPs.

While there is much debate over whether the Cheap Medicine Agreement will really help less-developed countries import cheaper generic, life-saving drugs,[77] one thing is clear: the generic drugs accord

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[74] "Intellectual Property: Patently Problematic" *The Economist*, 364:8290 (September 14, 2002) 75; reported in wtoforum@yahoogroups.com, September 13, 2002 (Digest No. 96).

[75] C. Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (Geneva: WHO, 2002).

[76] F. Fleck, "WTO Finally Agrees on Cheap Drug Deal" (2003) British Medical Journal 517.

[77] For example, see R. Elliott, "Canada can carry much more" *The Globe and Mail* (September 23, 2003).

pierced the underbelly of the legal globalization juggernaut and presaged the political force of the developing member states to stymie or even reshape WTO uniform standards deemed to favour the corporate interests of developed member states.

The failure of the recent WTO talks in Cancun underscored the growing limitations of the WTO as a force for trade liberalization (and its partner, legal globalization), especially when the 149 Member body attempts to deal "by consensus" with an issue as contentious as agriculture.

The Cancun talks collapsed, in short, because a remarkably cohesive coordinated group of developing countries, including the African Caribbean and Pacific Group (ACP), the African Union, the Less Developed Countries Group (LDC), Brazil and Asian countries such as India and Malaysia, rejected the offer of mild cuts in EU, US and Japan subsidies and food import quotas.[78]

IX. PARKING THE WTO'S "SINGAPORE ISSUES"

Perhaps more important for our immediate purposes, the real reason why the Cancun meeting ended without an agreement on the Ministerial Text was that many developing countries would not agree to launch negotiations on the so-called "Singapore issues" which have been pushed by the European Union and the US (and sometimes Canada) for the past seven years.

The Singapore issues referred to the development of common approaches (or even, hopefully, harmonized legislation) by WTO members to foreign investment rules, competition law, government procurement procedures and uniform trade facilitation measures. Although about 80 Developing Countries (DC) formally submitted their position that they would not want negotiations to start, the Conference Chairman (the Foreign Minister of Mexico) came out with a draft that called for negotiations in three of the four areas (procurement, trade facilitation and investment).[79]

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[78] S. Chase, "Impasse Scene Hurting WTO" *The Globe and Mail* (November 16, 2003) B3.

[79] The Developing Country perspective on the Singapore issues is graphically summarized by B. Lal Das, *On the Status of Singapore Issues Post-Cancun* (Third World Network, 2003).

This railroading did not sit well with the DC group. It could be said that the WTO at Cancun set itself up for failure. As late as August 2003, it was clear that major differences could not be resolved amongst groups of countries in a short period of time in areas of extreme importance such as agriculture and non-agriculture market access, and the fate of the so-called Singapore issues. The whole process and the preparations for Cancun forecasted defeat and collapse of the negotiations where Ministers could never be expected to make large compromises in five days on an extremely ambitious agenda when the Members themselves are nowhere near compromise or settlement.

What are the immediate and short term repercussions of the collapse of the Cancun Ministerial Conference? For one thing, more pressure will be brought to bear to move the Singapore issues off the WTO agenda since, much like some aspects of TRIPs, they are not core trade issues and attempts by the EU at Cancun, in particular, to bring them into the WTO system only exacerbated long-standing acrimony and division. Whether the "democratic deficit" of WTO negotiations can or will be repaired, after the Seattle and Cancun debacles, is an open question.

The Director-General of the WTO recently appointed a group of "sages" (APEC used to call them "Eminent Persons") to advise him on issues affecting the future of the organization, including its governance structure and framework for negotiations. Unfortunately, it does not appear that "concerned members of the public will be able to share their views about these matters with this group, or participate in its deliberations".[80]

X. WERE THE URUGUAY ROUND AGREEMENTS THE HIGH WATER MARK OF LEGAL GLOBALIZATION?

The Uruguay Round Agreements undoubtedly provided the most legislative templates for the harmonization of national commercial and trade legislation in modern history. Membership in the WTO now stands at 148 nations. More legislative harmonization has occurred in the past ten years than in any other comparable period of time.

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[80] R. Howse, "Eminences grises" WTO Forum, Digest Number 351, September 18, 2003.

However, we must remember that in the WTO, in contrast to the methods and outputs of organizations such as UNIDROIT and UNCITRAL, the reality of the "Single Undertaking" approach leaves many countries no choice

> "but to accept the package of agreements negotiated within a given round of the WTO. It is not surprising to find, therefore, much more sensitivity and resistance among many member countries, especially during the last few years following the experience of the Uruguay Round, toward the introduction of any new issue onto the negotiation agenda."[81]

Cancun marks the first time that a bloc of (developing) member states openly thwarted efforts by developed member states (led, in this case, but with varying levels of conviction and political expediency by the European Union, the United States and Japan) to bully them towards a "consensus" result (that is then expressed as a Single Undertaking).

There is some similarity in the Cancun results and the demise of the OECD-backed Multilateral Investment Code ("MAI") where a range of capital-importing developing states, by concerted effort, refused to take up the model legal framework proposed by the OECD (supported by the ICC).[82]

Interestingly, some of the more contentious recommended MAI legal prescriptions favouring foreign investors turned up in several of the legal conditionalities imposed by the IMF in its financial support packages extended to Indonesia, Thailand and South Korea following the 1997 Asian Financial Crisis.[83] Other, more expansive statements of foreign investor treatment have also appeared in recent bilateral trade agreements negotiated by the United States, for example, with Vietnam.[84]

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[81] Reich, *supra* note 54 at 33.

[82] OECD, *The Multilateral Agreement on Investment* (the MAI Negotiating Text, 24 April 1998). For a Canadian perspective on the MAI text and its process of negotiations, see Smythe, 1998.

[83] Neilson, *supra* note 72.

[84] *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, effective January 1, 2002. This Agreement is often described as a "WTO-Plus" agreement, given the significant concessions by Vietnam on a range of issues, including US investor national treatment issues, government procurement and limited transition time for reducing goods and services barriers.

There is every reason to believe that a majority of the so-called Singapore Issues will find legislative expression in the growing number of US free trade agreements just negotiated or under negotiation with Asian trading partners.[85] The United States Trade Representative, after the failure of the Cancun talks, announced his government's intention to pursue "zealously" regional and bilateral trade agreements with developing countries in Latin America and Asia[86] who are seeking improved access to the US market.

For commercial and economic legislation, this next round of trade agreements (which Canada is pursuing in its own right) may appear to be a downsizing of legal globalization—however, its cumulative effect may actually prove to be more pronounced and pervasive in pushing US/western legal templates into the legislative frameworks of the developing world.

XI. ON SURVEYING THE THIN TO THICK EVOLUTIONARY PROCESS OF LEGAL GLOBALIZATION

In this brief essay, I have obviously plotted only some of the ebbs and flows of legal change regulating and facilitating trade and commerce both regionally and globally over the centuries: the legal inclusivity of the Romans, the adaptability and pervasive impact of the Law Merchant, the largely insular legal experience of the Middle Kingdom, the influence of colonial legal transplants and the early state trading monopolies, taking us to the days of rationality and the search for unified law, largely centred in western Europe, in the late nineteenth and early twentieth century.

We then considered the reorganization, indeed the revitalization, of international trading and financial relations that followed the Second World War, epitomized in the humble beginnings of the GATT and the ongoing influence of business organizations such as the ICC as an advocacy group promoting "best practices" conduct codes and model legislation. This took us to the recent WTO Cancun Ministerial Conference where the continuing after-effect of the Uruguay Round Master Agreements was stymied, if not buried, by the coordinated efforts of the less developed countries. Their efforts, we should note, were dedicated to changing global legal rules as opposed to not localizing them.

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85 Ravenhill, *supra* note 62 at 4-5.

86 Stratfor's Global Intelligence Report, September 25, 2003.

Hopefully, this paper has helped to set the stage for the question of where participatory justice fits into the legal structuring of the global economy.

The Rule of Law: Challenges in a Global Economy

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* Dean of Law, University of Calgary. I was assisted in the research for this paper by Carolyn Kruk, a student in the Faculty of Law at the University of Calgary. The underlying analysis of this paper will contribute to a book on the emergence of Canadian constitutional theory and the influences on the development of that theory co-authored by the author and Professor Jean-François Gaudreault-Desbiens of the University of Toronto Faculty of Law and funded by the Social Science Research Council of Canada.

We in Canada tend to be somewhat smug about the centrality of the rule of law to our legal and political identity. It is, after all, one of those identifying features that make us a liberal democracy. The phenomenon of globalization, however, may require us to take a far more critical look at how deeply rooted the rule of law in fact is in our constitutional structure and whether it will forced to adapt to developments transcending our domestic boundaries. Indeed, one might say that the issue is not "whether" but *how* our understanding of the rule of law will be required to adapt. As the guardians of the rule of law, the judiciary needs to be aware of challenges to the continued applicability of our rule of law and its capacity to support democratic values.

In any system which claims to be based on laws—at least laws that fulfil certain prescriptions in form—rather than being governed by an all powerful sovereign, by the divine right of kings or by some other arrangement contingent on arbitrary decision-making by individuals, the rule of law will be a fundamental constitutional principle. The rule of law has been one of Canada's most significant constitutional principles since the country's inception, inherited by implication under the Preamble to the then *British North America Act, 1867*. It has been described as "a fundamental postulate of our constitutional structure."[1] Although it has since been explicitly acknowledged in the Preamble to the *Canadian Charter of Rights and Freedoms*,[2] that recognition alone has given it neither any greater importance since 1982—its status rests predominantly in its role as an unwritten principle—nor has its meaning in the jurisprudence changed fundamentally since the Court first acknowledged its importance.[3] The capacity of the rule

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1 *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121 at 142.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.) 1982, c. 11. The Preamble reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

3 There is a view that the principle has acquired a more powerful capacity to invalidate legislation since its explicit inclusion in the Constitution: P.J. Monahan, "Is the Pearson

of law to ground an independent basis for action is, however, currently at issue in the British Columbia tobacco litigation where the Philip Morris Company has argued that several components of a procedural rule of law have been contravened.[4]

While the Supreme Court has emphasized different aspects of the principle, it has generally seen it as comprised of three elements: equality before the law; the existence of a system of positive laws; and the need to ground all government action in law. It has also articulated a clear and direct association between the rule of law and democracy. Thus while in many respects our Canadian version of the rule of law is hardly unique, it is one that is closely identified with the democratic form of government characterizing that cluster of countries of which Canada is a part, the "liberal-democratic western democracies." Finally, the Court's opportunities to interpret and apply the principle in any detail have occurred in a domestic, as opposed to international, context.

The question, then, for the rule of law as it has been defined in Canada is how it is likely to fare in its interaction with the current and future phenomenon of globalization. Canadian domestic courts increasingly rely on or at least consider international norms or rules in their jurisprudence. At the same time, the growth of international decision-making has in some respects displaced the domestic judicial system. Discussions about globalization have included consideration of the development of a more universal rule of law, one that could be accepted by countries—China is often mentioned here, but there are many possibilities—which currently do not abide by the same notion of the rule of law held by the western liberal democracies[5] or which

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Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 Osgoode Hall L.J. 411.

4 These arguments are set out in D.R. Clark & C.A. Millar, "British Columbia Tobacco Litigation and the Rule of Law" in this volume. The position that the rule of law does not ground a distinct basis of action is developed in R. Elliott in his contribution under the same title.

5 I would argue that there is a "liberal-democratic" form of the rule of law. Peerenboom suggests, however, that we should be wary of assuming that "rule of law discourse has evolved in a uniform way in Western countries," citing France as a country where the development has been different from that in many other western countries. One reason he identifies for saying that France has developed differently is that constitutionalism has not taken root there largely because of the principle of legislative supremacy. For Canadians, this distinction is not of much import since it is only in the past twenty years that we have developed constitutional supremacy rather than legislative supremacy. Peerenboom appears to use the United States as the "model" or norm for the rule of law

are not enamoured of the virtues of democracy. Some observers have argued for a "global citizenship" which will transcend national citizenship. All these developments, related to the growth of globalization, have implications for the rule of law. What challenges do the ramifications of globalization pose to our courts in applying the rule of law and to our reliance on the rule of law as a major element in our constitutional framework?

After exploring the meaning, scope and significance of the rule of law and more briefly, the meaning and ramifications of globalization, I will explore the issues raised above.

I. SETTING THE PARAMETERS

In order to consider the relationship between the rule of law and globalization, it is necessary to establish the parameters of the discussion: the assumptions on which the analysis is based and the meaning of and major issues arising from the rule of law and from globalization. With respect to the latter, globalization, I restrict my discussion to identifying which of the many aspects and consequences of globalization have particular relevance for the rule of law.

A. The Rule of Law

As a starting point, it is relatively simple to identify the components of the rule of law as understood by the Supreme Court of Canada. This will not exhaust the values associated with the principle, however, and these values have as much significance to this discussion as a bare assertion of the components has.

In the *Manitoba Language Reference*, the Supreme Court identified two (non-exhaustive) aspects: "that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power;" and that it "requires the creation and maintenance of an actual order of positive laws which preserves and

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in western countries. See R. Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion", University of California, Los Angeles School of Law Research Paper Series, Research Paper No. 03-16): http://ssrn.com/abstract=445821 [hereinafter "Varieties of Rule of Law"]. "Varieties of Rule of Law" is an introduction to *Asian Discourses of Rule of Law*, Routledge Curzon, January 2004.

embodies the more general principle of normative order."[6] Indeed, the principle is more than one constitutional principle among many; rather, it is

> "clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law."[7]

In its more recent pronouncement on the subject, the Court identified three components of the rule of law which "[t]aken together... make up a principle of profound constitutional and political significance."[8] They are that "[t]here is... one law for all" and that there must be an actual system of positive laws, the elements set out in the *Manitoba Language Referenc*e; and that "the relationship between the state and the individual must be regulated by law," that is, that the exercise of government power must be grounded in law.[9]

In some respects, the Court's consideration of the principle has not strayed far from the Diceyan articulation of the British principle in the late nineteenth century.[10] For Dicey, the rule of law was a term which comprises three characteristics of the legal and political system: that no one is above the law which is enforced by the "ordinary courts;" that government must act according to law and not in an arbitrary or highly discretionary manner; and that citizens' rights evolve through judicial decisions, that is, he championed the superiority of the unwritten or common law constitution.[11] In fact,

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6 *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at paras. 59-60.

7 *Ibid.* at para. 64.

8 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

9 *Ibid.* at para. 71.

10 A.V. Dicey, *Introduction to the Study of Law of the Constitution* (London: MacMillan, 1885).

11 Dicey's view has been called "a rather minimalist conception of the Rule of Law" D. Rhéaume "Language Rights, Remedies, and the Rule of Law" (1988) 1 Can. J. of L. & Juris. 35 at 36. It should be noted that Dicey's third component, the unwritten constitution, does not form part of the Supreme Court's statements about the components of the rule of law in either the *Manitoba Language Reference* or the *Quebec Secession Reference*.

Dicey's conception was not without its contemporary critics, given his opposition to administrative decision-making. In Canada today, the expansive nature of administrative law and since 1982, the existence of a primarily written constitution mean that Dicey's articulation might be thought of little import except as part of the historical development of the principle in Canadian constitutional law.[12] Yet it would, I believe, be incorrect to assume that Dicey's views have not influenced the Supreme Court's understanding of the concept which has remained relatively static. The basic principle of legal equality and the grounding of government action in law remain crucial characteristics of democratic systems governed by the rule of law. It is not that these are no longer important, for they decidedly are. The issue is whether they are sufficient to define the rule of law in a contemporary democracy; I will return later to this question.

It should be obvious that the mere existence of laws is not sufficient to constitute the rule of law. It is worth emphasizing the distinction between "rule *by* law" and "rule *of* law." The former contemplates that while laws govern, they do not necessarily govern government itself but rather aid in government's exercise of power.[13] Thus the rule of law may be used to strengthen the authority of the state or to establish limits on the state. The distinction is important as nations characterized as ruled by law seek to join global organizations such as the World Trade Organization. Epstein, writing in the mid-nineteen eighties, while adopting a Diceyan definition of the concept, captures both these apparently opposing functions in defining the rule of law as "a body of general and formal principles that public officials exercising sovereign authority can use both to resolve disputes between citizens and to justify the use of force."[14] Davis associates the rule of law with "constructing a dynamic venue for contestation" and not merely as a

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[12] On an example of Dicey's more direct impact on the development of Canadian constitutional law, see D. Schneiderman's discussion of Dicey's opinion about Ontario legislation validating municipal contracts with the Hydro-Electric Power Commission in "Canadian Constitutionalism, the Rule of Law, and Economic Globalization" in this volume.

[13] T. Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs*: item 397349: http://80-web20.epnet.com.ezproxy.lib.ucalgary.ca (June 12, 2003). Also see Peerenboom, *supra* note 5.

[14] R.A. Epstein, "Beyond the Rule of Law: Civic Virtue and Constitutional Structure" (1987-88) 56 Geo. Wash. L. Rev. 149 at 150-151. This article was taken from HeinOnLine.

way of limiting government.[15] The difference between "rule by law" and "rule of law" is central to the difficulty of enabling the development of a satisfactory universal definition of the rule of law, as has been proposed as a concomitant of globalization.

While the Supreme Court's articulation of the meaning of the rule of law might be considered rather sparse, closer to the thin meaning than the thick, the Court has been clear about the significance of that narrowly defined postulate to our constitutional framework and practice. The Court's treatment of the principle must be viewed in the context of how the Court develops the relationship between the rule of law and other unwritten principles, particularly democracy and judicial independence; in doing so, it surrounds its apparently meager core with a cushion of normative values. In the case of democracy, the rule of law is associated with civil liberties and the capacity of the population to participate in the system. Inherent in the notion of "law" is that they are enforceable, that is, effective. More controversially, it might be argued that the rule of law requires equal capacity to vindicate legal rights.16 Regardless, it is not realistic to talk about the rule of law without also talking about the role of the courts and why judicial independence is also an important—and interrelated—constitutional principle. Thus Michael Davis, in arguing for a liberal democratic Hong Kong, stresses the need for the rule of law, "notably judicial review of legislation under a constitution or basic law."[17]

Our Canadian understanding has generally stressed the benefit of the rule of law to citizens, seeing it as a restraint or check on government power. One might say that the rule of law is about "the compulsion of accountability."[18] Accountability requires that it is possible to identify those who are to be accountable, whether individuals or institutions, and to whom they are to be

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[15] M.C. Davis, "Constitutionalism in Hong Kong: Politics versus Economics" (1997) 18 U. Pa. J. Int. 157 (HeinOnLine) 159.

[16] I explore this in P. Hughes, "A Constitutional Right to Civil Legal Aid" in *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (CBA, February 2002).

[17] Davis, *supra* note 15 at 159. China made a commitment to the continuation of the rule of law in Hong Kong in the *Joint Declaration on the Question of Hong Kong* signed on December 19, 1984: *ibid.* at 157.

[18] M.O. Chibundu, "Globalizing the Rule of Law: Some Thoughts at and on the Periphery" (1999) 7 Ind. J. Global Leg. Stud. 79 at 81, 84 [http://www.lexis.com].

accountable. In our system, accountability under the rule of law lies with the courts.

It will be recalled that for Dicey the centrality of the courts is crucial to the operation of the rule of law, a position perhaps outdated even then. The greater bureaucratization of society since then has required us to recognize that administrative tribunals are part of the legal order, although generally, we limit their autonomy by ensuring some form of judicial review by the "ordinary courts," to use Dicey's phrase. As far as tribunals are concerned, the important principle which safeguards the judges in fulfilling their role in upholding the rule of law, judicial independence, does not apply.[19] A greater threat in some ways to the role of courts is the significant increase in the use of extrajudicial forms of dispute resolution which privatize the settlement of disputes, taking them out of the courts and thereby often out of the law. This is the case even though judges have become involved in these forms of dispute resolution and even though private settlements may eventually be enforced by the courts. Usually, these disputes arise under law and the legal rules govern their resolution to some (varying) extent.

At the heart of the ramifications of the process of globalization for the rule of law is whether it is primarily a functional concept or a normative

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[19] *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, online: QL (SJ), 2001 SCC 52. McLachlin C.J., for the Court, distinguished between courts and tribunals at paras. 22-24:

> "Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question... This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts... Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are in fact created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected." [Citations omitted.]

framework, the thin and thick version to which I referred earlier. A "thin" theory of the rule of law emphasises procedural characteristics: laws must be "general, public, prospective, clear, consistent, capable of being followed, stable and enforced."[20] A "thick" theory adds or "incorporate[s] elements of political morality such as particular economic arrangements..., forms of government ... or conceptions of human rights."[21] Bouloukos and Dakin point out that "[w]hat began as a narrow, positivist conception has broadened into a more expansive view that incorporates notions of good governance, democracy, and even human rights in the rule of law."[22]

Scheuerman states that he "follow[s] intellectual convention by defining the rule of law as requiring that state action rests on legal norms (1) general in character, (2) relatively clear, (3) public, (4) prospective, and (5) stable... [O]nly laws of this type can help provide legal equality, assure fair notice, and guarantee the accountability of powerholders."[23] Carothers defines the rule of law "as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone" and uphold universal human rights and the right of accused to a fair, prompt hearing and the presumption of innocence; the courts and other elements of the legal system "are reasonably fair, competent, and efficient" and "[j]udges are impartial and independent." He argues that "[p]erhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding."[24] The International Commission of Jurists in 1959 viewed the concept as divided into its substantive content, referring to "the conception of society which inspires it," and the "*procedural* machinery" necessary to give it

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[20] For one articulation of this commonly used way of differentiating a functional and a normative view of the rule of law, see R. Peerenboom, "Social Networks, Civil Society, Democracy and the Rule of Law: A New Conceptual Framework", Research Paper No. 03-1 (The Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract_id=372680), 17 [hereinafter "Social Networks"].

[21] *Ibid*. at 18.

[22] A.C. Bouloukos & B. Dakin, "Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development" (2001) 42 Intern'l J. of Comp. Sociology (Brill): item 4646586: http://80-web20.epnet.com. ezproxy.lib.ucalagry.ca (June 12, 2003).

[23] W.E. Scheuerman, "Economic Globalization and the Rule of Law" (1999) 6 Constellations 3, 4.

[24] Carothers, *supra* note 13.

reality.[25] The rule of law, the Commission said, is "based on the values of a free society, by which is understood a society providing an ordered framework within which the free spirit of all its individual members may find fullest expression." In this sense, then, the rule of law may be said to combine an emphasis on individual rights such as "freedom of worship, speech and assembly" to be exercized free from interference by government *and* "access to the minimum material means" necessary to enjoy the first type of right.[26] In short, it captures the tension of modern liberalism.

These propositions are not without controversy. Even the most apparently obvious characteristics—such as generality, clarity, no retroactivity or stability—may be more complicated than they first seem.[27] Uncritical lip service to the postulates which govern us may make us complacent about other implications. For example, the principle that everyone is equally subject to the law addresses the fact that the powerful and the rich—and specifically the sovereign—were above the law; it was meant to ensure that the sovereign would be as equally subject to the law as the "ordinary person" and it referred to the power of the courts to govern the sovereign. It does not apply as easily to the notion that the same law may disadvantage those who are poor or otherwise "out of step" with the norm on which the law is based. Thus one might ask whether the rule of law requires us to recognize that law affects different communities differently.

The more complex its scope becomes, the more the content of the rule of law will be almost certainly inferred from a country's legal culture, respecting the rights which are "part of the backbone of the legal culture, part of its fundamental traditions."[28] In that sense, the values of the political system are implicit in the rule of law, which will assume different forms in different countries. On one view, they do not, however, necessarily become part of the principle itself which, it is argued, is best left as a procedural principle. To require it to carry substantive content is to require too much, on this view. One must look elsewhere for the substantive elements of the legal

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[25] International Commission of Jurists; *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India* (Geneva, 1959) 191 (italics in original).

[26] *Ibid.* at 193.

[27] A. Marmor, "The Rule of Law and its Limits" USC Public Policy Research Paper No. 03-16: Social Science Research Network: http://ssrn.com/abstract=424613, 11ff.

[28] J. Raz, "The Politics of the Rule of Law" (1990) 3 Ratio Juris 331 at 337.

order. Epstein, for example, says that the rule of law is a necessary but not sufficient condition for a just social state and that the "justice" must be found in "the foundations of political theory and modern constitutionalism.[29] The objective of this process or formal rule of law is that law-making and enforcement are carried out in a manner which permits citizens to organize their lives without running afoul of the law and to seek redress for perceived grievances.[30] Thus "[a] commitment to the rule of law ... requires knowable and known law, applied retrospectively and consistently, and promulgated and reviewed by individuals other than those charged with applying it."[31]

The characteristics identified by the formalists are not insignificant requirements and the application of the same law to everyone, the placing of the governed on the same plain as the governors, was a crucial step in the development of modern forms of democracy. The question, however, is not whether these should be characteristics of a regime of law—they should be—but whether alone they provide an adequate measure for whether government has complied with law. Is process, important as it is, sufficient to constitute legitimacy?

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[29] Epstein, *supra* note 14 at 154.

[30] Lon Fuller, for example, argued that the internal morality of law requires that it be general, publicly promulgated, clear, not retroactive, consistent over time, capable of being followed and that there be a congruence between official action and the rule stated in the law: *The Morality of Law* (New Haven: Yale University Press, 1964). Joseph Raz added to these the independence of the judiciary, judicial review and easy accessibility to the courts: "The Rule of Law and Its Virtue" in *The Authority of Law* (Oxford: Clarendon Press, 1979). See also L.B. Solum, "Equity and the Rule of Law" in I. Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994) 120 at 122. A number of definitions are summarized by S.J. Burton in "Particularism, Discretion, and the Rule of Law" in Shapiro, *ibid*. 178 at 180.

[31] K.D. Hine, "The Rule of Law is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and the Debate over Judicial Discretion" (1997) 50 SMU Law Rev. 1769, 1772. Hine's argument is that equity has displaced law, but that the rule of law is necessary "to ensure the continued integrity and efficacy of our system of justice." Accordingly, the best approach is a positivist/formalist law approach permitting occasional excursions into moralist/realist equity, in a sense a return to a system of law mellowed by equity.

The fact of law is not the same as the fact—or at least the objective—of fair or just law. Nor is it the fact that the authorities abide by the law or respect the form of the law. It is notorious that the National Socialists carried out their genocide, white South African governments their apartheid, the Canadian government the oppression of native peoples and the American and Canadian governments the internment of Japanese citizens during World War II according to law. A purely formal rule of law has nothing to say about these actions; a Diceyan interpretation which includes a bow in the direction of civil liberties could raise its voice; but only a rule of law which entertains the legitimacy of only certain kinds of moral precepts has the substance to challenge them. For the incorporation of *any* kind of normative content—and not only certain kinds—is equivalent to the incorporation of none. On the other hand, a rule of law aligned with democracy of necessity must acknowledge particular moral or political values.

Nor is a "formal" rule of law neutral in its application, as some would have it. To be devoid of *explicit* content or substance is not to be devoid of *any* substance.[32] The veiling of the substance has its own dangers. Even with respect to the very core of the principle—that rule not be arbitrary—Beehler has argued that the procedural rule of law (or rule by due process) conveys a different understanding of arbitrary rule from that of a substantive rule of law (or rule by right reason):[33] with a procedural rule of law, arbitrary rule is merely unregulated rule, while on a substantive rule of law conception, arbitrary rule is non-legitimated rule.[34] Radin views the formalist version

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[32] R.S. Summers, "A Formal Theory of the Rule of Law" (1993) 6 Ratio Juris 127 at 128. Summers maintains that the formal approach is preferable because it is more "focused" and can lead to a fuller realization of the principle if it is not hampered by substantive content; because it is "more or less politically neutral", its components are less controversial and more likely to obtain support from disparate groups: *ibid*. at 136. Ernest Weinrib cautions that treating the rule of law as if it is by definition ideological "implies not only that law is an instrument available for exploitation by hierarchically entrenched groups, but that it can be nothing else": E.J. Weinrib, "The Intelligibility of The Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 59 at 61. But ideology does not have to be supportive of hierarchically entrenched groups, it can also be supportive of egalitarianism. The point is, it cannot be neutral or without consequence for the ordering of society and the treatment of its citizens. The real questions concern who decides what the consequences are, the nature of the consequences, the reconciling of apparently antagonistic consequences and the limits of adverse consequences.

[33] R. Beehler, "Waiting for the Rule of Law" (1988) 38 U.T.L.J. 298 at 298.

[34] *Ibid.* at 300.

("instrumentalist" in her nomenclature) as "a model of government by rules to achieve the government's ends," while the substantive version is "a model of government by rules to achieve the goals of the social contract: liberty and justice."[35]

In this respect, although the Supreme Court's definition of the concept may seem narrow, it satisfies the indicia of rule *of* law rather than rule *by* law. It might be considered at least a "quasi-thick" definition given the Court's view of the close association of the rule of law and democratic government. (It is not a "thick" definition because the Court does not find these values in the rule of law itself, but in the importance of the rule of law for the realization of other principles.)

> "The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the sovereign will is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the sovereign will or majority rule alone, to the exclusion of other constitutional values."[36]

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[35] M.J. Radin, "Reconsidering the Rule of Law" (1989) 69 Boston U. L. Rev. 781 at 792. In another typology, the formalists would also conform to the "legal process type": R.H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Col. L. Rev. 1, 18-21. Also see A.C. Hutchinson & P. Monahan, "Democracy and the Rule of Law" in Hutchinson & Monahan, eds., *supra* note 32 at 97, on the question of the non-neutrality of a formalist rule of law.

[36] *Reference re Quebec Secession*, *supra* note 8 at para. 67.

In the end, then, it is not as easy as it might have seemed to provide a simple statement about the meaning of the rule of law. Even that ostensibly useful dichotomy between a "thin" and "thick" version is less useful in practice than it should be.

Once we move beyond identifying the component elements of the Canadian rule of law, we generally accept three propositions about the purposes of or functions fulfilled by the rule of law. One is that it is necessary for justice and for the realization of the civil liberties which mark our understanding of democracy. The second is that the rule of law aids in establishing the legitimacy of law, that is, the acceptance of law, because part of its meaning is that no one is above the law, all are supposed to be treated equally under the law. Legal equality is a *sine qua non* of a regime purporting to operate in accordance with the rule of law. The third function (not one we often see in the jurisprudence) is that it is necessary for a functioning economy, that a viable economic system relies on an ordered system of rules. Davis considers the rule of law a necessary condition for a "world city" (by which he means Hong Kong) which "may have a global role in bringing information and financing to an entire region and beyond."[37] From this perspective, the rule of law provides the freedom to realize the potential of economic circumstances. Peerenboom comments that the "[r]ule of law, with its fundamental tenet that government officials obey generally applicable laws, promised the predictability and certainty required to do business ..."[38]

What does it mean to say that political action or judicial decision-making is legitimate because it has complied with the rule of law? In essence: what are the *indicia* of legitimate law? Equally, it is likely that globally there can be greater agreement reached on a formalistic understanding of the rule of law than on the substantive content. The rule of law *has* evolved; it has been static neither in time nor place.[39] Yet it is almost certain that globally there can be greater agreement reached on a formalist understanding of the rule of law than on any substantive content and only if one steers clear of normative judgements about particular systems of government. The formalist conception is an important beginning, but is it really enough and more

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[37] Davis, *supra* note 15 at 191.

[38] Peerenboom, "Social Networks" *supra* note 20 at 19.

[39] F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986); H.W. Arndt, "Origins of Dicey's Concept of the Rule of Law" (1957-58) 31 Australian L. J. 117.

importantly, does it pose a threat to the thicker version which helps sustain and advance other aspects of Canadian constitutionalism and the relations between government and citizen? Yet as Peerenboom indicates, concurrence even in the West on the components of a "thick" rule of law is difficult to achieve "in this age of postmodern, postmetaphysical multiculturalism and identity politics."[40] How much more difficult to reach agreement on an "enriched" rule of law at the global level.

B. Globalization

To understand the rule of law in the context of globalization requires that we establish what we mean by "globalization" and identify some of its ramifications. I do not intend to debate the issues associated with globalization, but merely to explain how I see it as a background to the discussion of the rule of law.

Firstly, it has now become trite—but nonetheless necessary—to point out that globalization is not new. Indeed, Canada itself is in some ways the result of an earlier stage of globalization, not only because of the impact of British and French colonization, but also because of the migration of those whom domestic economies could not adequately absorb. Yet even that occurred rather late in the globalization process. It is the *speed* which differentiates earlier experiences with globalization from our experience today,[41] so much so that speed may be sufficient to make today's globalization a distinct phenomenon, one qualitatively different from apparently similar developments in the past. The Internet is not merely a faster telegraph or fax machine, it is fundamentally different and revolutionary. Secondly, globalization encom-passes the movement of people, capital, goods and information across borders and certainly in our own time, the use of high speed technology to move capital and information, as well as faster transportation of goods, across borders. Together these major *indicia* of globalization distinguish the breadth and unintended impact of globalization compared to more primitive and earlier versions and suggest the difficulty in

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[40] Peerenboom, "Social Networks" *supra* note 20 at 26.

[41] A concise history of "globalization" since the sixteenth century can be found in M.R. Brawley, *The Politics of Globalization: Gaining Perspective, Assessing Consequences* (Peterborough, Ont.: Broadview Press, 2003), ch. 8. Also see D. Held, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization" in N. Dower & J. Williams, eds., *Global Citizenship: A Critical Introduction* (New York: Routledge, 2002) 92 at 94-95.

a nation's extricating itself from the integrated web of contemporary and likely future globalization. Although globalization today seems to have its own momentum, however, it is neither neutral nor abstract nor without dominant actors or agents which influence its direction.

Globalization is generally associated with economic developments or financial transactions. Thus Scheuerman identifies globalization with

> "(1) internationalization of capital and financial markets, (2) increases in the volume of trade in semi-manufactured and manufactured goods between the industrialized economies, (3) growing importance of MNCs [multinational corporations] in the world economy ... (4) near universal movement towards regional economic and political blocs (NAFTA [North American Free Trade Agreement], ASEAN [Associ-ation of Southeast Asian Nations], EU [European Community]) [and] (5) the acceptance by almost all states that they should 'do all they possibly can to attract and support both national and international capital,' a development which has been called the 'new prag-matism.'"[42]

Scheuerman points out, however, that while multinational corporations do business across the globe and appear to have a transnational character, they are based in certain countries;[43] on the other hand, "many MNCs possess economic muscle far superior to that of small and medium-sized states" and it is tempting in some circles to consider granting them legal autonomy within the meaning of international law.[44] In short, globalization as we now think of it is less characterized by the movement of people, information, goods and capital than by the speed with which these can occur, particularly capital and information and, at least on paper, goods and by the size and corresponding impact of corporations.

Brawley discusses a range of definitions of globalization developed in different disciplines, but a number of different economic criteria stand out: these include the interdependence of markets and production in different countries, the volume of international trade and the nature of the goods being

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[42] Scheuerman, *supra* note 23 at 5. The phrase "new pragmatism" is cited by Scheuerman from J. Stopford & S. Strange, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991) 5.

[43] *Ibid.*

[44] *Ibid.* at 10.

traded, the mobility of production and greater integration of financial markets.[45] While there is a great emphasis on economic changes, and on the political decisions that interact with (but may neither determine nor be unaffected by) economic changes, there are also psychological and sociological implications or characteristics of globalization. Thus the processes of globalization have changed the way many people think about their place in the world. It has compressed space and time.[46] Furthermore, while we may talk about the decline of the nation-state, the role of cities may be increasing;[47] in Canada, for example, a debate has begun about constitutionalizing the status of the city. The technological transfer of capital and information is difficult to track should those transferring it wish that to be the case and as a result high speed crime is as much a characteristic of globalization as is information transfer.

Globalization is a complex subject, mixing "territorial diffusion of things, people and ideas" with interdependence,[48] with apparently conflicting consequences, including the contemporaneous decline in the efficacy of the nation-state with the rise in importance of local and regional bodies.

It is common to name the decline of domestic sovereignty as one of the consequences of globalization, along with the dominance of stronger countries, the growth of international norms transcending or incorporated into domestic laws and practices and the rise in the authority of transnational corporations, even to the extent of supplanting political authorities. Because of our proximity to the United States and the relative sizes of our populations, Canada has long been experienced in the impact strong external forces—economic, political and cultural—may have. Issues of sovereignty and cultural nationalism are far from new issues for us. Even so, these effects were (and are) more obvious and unidimensional than are the effects of globalization. Globalization today transcends or moves above the modern

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[45] Brawley, *supra* note 41 at 13-16; see citations therein.

[46] *Ibid.* at 17. On "ways of thinking," see E. Kofman & G. Youngs, "Introduction: Globalization—the Second Wave" in E. Kofman & G. Youngs, eds., *Globalization: Theory and Practice*, 117, cited in Brawley, *ibid.*

[47] *Ibid.* at 18, citing A. Harding & P. Le Galè, "Globalization, Urban Change and Urban Politics in Britain and France" in A. Harding & P. Le Galè, eds., *The Limits of Globalization: Cases and Arguments* (Londong: Routledge, 1977) 189-192.

[48] H. Teune & Z. Mlinar, "The Development Logic of Globalization" in J.V. Ciprut, ed., *The Art of the Feud* (Westport, CT: Praeger, 2000) 106, cited in Brawley, *ibid*. at 18.

creation of the state and makes location of activity less significant, yet location has been fundamental in enforcing law. This has enormous ramifications for public domestic law enforcement bodies such as courts and for the increase in centres of rule-making authority. Others will discuss this kind of thing at greater length but I want to raise these topics because they have great importance for the future of the rule of law. This phenomenon may be attributed to an impersonal "market" as in, "[t]he market is a more preferred institution for organizing and regulating economic transactions,"[49] but the market requires actors; the reference to the market really means that the economic actors which comprise the market have an autonomy greater than in the immediate past, although the political autonomy of the British East India Company or the Hudson's Bay Company should not be forgotten when we talk about the impact of corporations today. It also means, however, that the elements of the market are sufficiently interrelated to transcend a single state.[50]

The modern state is characterized by a single centre of authority; this is the case even in a federal state, where power is divided. As has been observed, "the development of internal sovereignty allowed the state to clearly distinguish itself from both civil society and the market."[51] In one way, globalization sees a return to the pre-modern state when there were different *loci* of competing authority (for example, religious authority and secular authority both competing for control of what we would now identify as matters within the authority of the state). David Held suggests that globalization has had the following impact on "the evolving character of the democratic political community:"

> "... [T]he locus of effective power can no longer be assumed to be national governments—effective power is shared, bartered and struggled over by divers forces and agencies at national, regional and international levels... [T]he idea of a political community of fate—of a self-determining collectivity—can no longer meaningfully be

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49 Chibundu, *supra* note 18.

50 While they may transcend a single state, they are subject to the laws of each state in which they operate. But the decision to operate in a particular state may be influenced by how friendly the laws there would be to this industry or that and the benefit of attracting an industry may be sufficient to affect what the law will be.

51 K. Jayasuriya, "Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?" (2001) 8 Constellations 442 at 449.

> located within the boundaries of a single nation-state alone... [T]here is a growing set of disjunctures between the formal authority of the state—that is, the formal domain of political authority that states claim for themselves—and the actual practices and structures of the state and economic system at the regional and global levels."[52]

There is an important difference in the fact that today "trans-governmental networks of regulatory agencies ... rather than supranational institutions, are increasingly preferred as a form of governance of the global political economy."[53] "Governance" is a term which applies not only to traditional government structures, but also to non-governmental or extra-governmental bodies. Some of these bodies gain authority because of the agreement of the member states (such as the World Trade Organization) and some of which do not possess formal authority, that is "a variety of emerging international decision making structures whose relationship to the formal authority of existing nation-states remains ambivalent."[54]

In summary, the characteristics and consequences of globalization of particular relevance to its relationship to the rule of law, especially for Canada and Canadian courts, are the following: the transnational political significance of major economic actors; non-judicial—privatized—decision-making; and the domestic implementation of international norms.

II. THE RELATIONSHIP BETWEEN THE RULE OF LAW AND GLOBALIZATION

Two basic questions help frame an exploration of the relationship between the rule of law and globalization: is globalization likely to be accompanied by a "thinning" of currently "thicker" version of the rule of law or by a shift in its constitutional function? Indeed, does globalization have the potential to make the rule of law obsolete? Even if such a dramatic development is unlikely, if only for instrumentalist reasons, to what extent does globalization diminish the domestic (here Canadian) understanding of the rule of law and its compatriot principles of democracy and judicial independence?

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[52] Held, *supra* note 41 at 97.

[53] Jayasuriya, *supra* note 51 at 450, citing A.-M. Slaughter, "The Real New World Order" (1997) 76 Foreign Affairs 183 at 196.

[54] Scheuerman, *supra* note 23 at 5.

Globalization has the effect of "unsettling the settled boundaries between domestic and international domains."[55] In other words, it unsettles the sovereign order. We may view the concept of sovereignty for this purpose both in the usual sense of national sovereignty and in a somewhat different but related sense of institutional sovereignty: to what extent do our decision-making institutions have the authority we believe them or intended them to have? This is obviously related to the more common question about the impact of globalization—the shifting scope of the economy—on territorial sovereignty. Thus just as Canada has been coming to terms with a new constitutional order, one premised on constitutional supremacy or sovereignty rather than legislative supremacy or sovereignty, more than one observer has pointed to a "transition from political constitutionalism to a kind of economic constitutionalism ... that gives a juridical cast to economic institutions, placing these institutions beyond politics."[56] A global economic constitutionalism may well conflict with a domestic political constitutionalism and how this conflict plays out will be significantly affected by the degree of authority remaining with the domestic government and judiciary.

One might add that the issue is not just the changing nature of economic institutions in this sense, but the location of these institutions and, at least equally significantly, the character of economic transactions. Traditionally, or at least since the development of liberal institutions, the focus has been on identifying the place where sovereignty resides. In Canada, this has meant in part determining whether federal or provincial institutions have authority or sovereignty over particular matters, although we have tended not to use the term "sovereignty" in this context; it is more commonly employed with respect to Canada's sovereignty vis-à-vis other nations, whether that relates to sovereign claims over northern waters, a legal matter, or the political ability, and not only the legal capacity, to make the decision whether to enter the war in Iraq. Nevertheless, it is a form of international autonomy or sovereignty. In brief, the question is which government makes the decision to engage in particular kinds of activity. But this modern notion of sovereignty as residing in government (or in the source of government) fails to take into account the "fragmentation" of "powers of governance" and their "diffus[ion]

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[55] Jayasuriya, *supra* note 51 at 442.

[56] *Ibid.* at 443. By "economic constitutionalism", Jayasuriya means "the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference." *ibid.* at 452.

with the market and civil society."[57] Again, this may be briefly stated as determining whose decisions matter, whether they have been given legal or political authority. The behaviour of economic institutions and processes may undermine the duly constituted authority of elected governments or may have a considerable impact on how those duly elected governments make decisions within *their* authority.

A. The Impact of International Law on Domestic Decision-Making

It is only recently that international law has widely been recognized as a form of law, yet today international norms and regulatory law in the trade area play a major role in domestic law; similarly, domestic labour, environmental law and human rights may be affected by transnational rules, all areas which were the subject of discussion at the conference of which this volume constitutes the proceedings. Most significantly, perhaps, this is an ongoing process. The rule of law has meaning only when there are mechanisms for its enforcement and therefore when some body at some level has the accepted or recognized capacity to enforce it. In the domestic context, this is a condition of an effective rule of law. The subject of the international rule of law may be the state or the individual. Under the dualist model, "[v]alid and binding international norms, while universal, are at the same time barred from trans-gressing the rigid border of a sovereign state and affecting individuals within that state, unless transformed into the domestic legal system through the legislative instrumentality of the state."[58]

Under monism, the relationship between international law and the individual is direct without the intermediary of the state and thus "international law will be automatically incorporated and available as a domestic law instrument before domestic courts."[59]

Hainsworth suggests that there is a third model in which the state is "a full-fledged participant in an integrated international community, 'both forming and complying with law.'"[60] Increasingly, the approach to international norms which sees them in effect as the subject of continual

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[57] *Ibid.* at 445.

[58] S. Hainsworth, "Sovereignty, Economic Integration, and the World Trade Organization" (1995) 33 Oh.L.J. 583.

[59] *Ibid.* at para. 15.

[60] *Ibid.*at para. 16.

negotiation is being replaced by a "rule-oriented" approach which have been most developed in the trade area.

All these international rules and norms may restrict the domestic capacity to act in accordance with existing domestic expectations, a point which has significance for government and judiciary. These international rules have all the *indicia* of positive law: for example, they are set out, knowable and enforceable. In fact, under the international rule of law, formal equality applies. Thus as one national leader said, the World Trade Organization "enshrin[ed] the rule of law in international economic and trade relations" with the result that "[r]egardless of the size of our economies, from now on we shall all enjoy the same rights and be subject to the same obligations."[61] The rule of law evens the playing field and contains the power of those who are bigger and stronger, as was meant to be the case on the smaller playing field of the nation-state. Unlike domestic rule of law, however, these international rules apply only to those who have agreed to have them apply to themselves. In the domestic context, those who do not abide by the rules are outlaws; in the international context, they may be the player who refuses to play but still is able to dictate the rules of the game. Like the domestic context, even when the "big guys play," does formal equality rebound in practice to the disadvantage of smaller, less powerful countries? In his paper in this volume, William Neilson points out that at the recent WTO negotiations in Cancun, the developing nations resisted the pressure of the dominant western nations; even so, it is far too early to conclude that the western nations cannot exert considerable impact on future developments.

From another angle, however, to what extent do we demand the presence of the rule of law before we engage in economic or political relations with other countries? And making the question more difficult to answer is whether we export our understanding of the rule of law to other countries, making their acceptance of it a condition of our engaging with them. Do we apply the rule of law to other standards or measures which are not themselves "law" or "rules" but norms and moral expectations which may well be reflected in our own law but not in the law of others? For example, it could be argued that a formalist rule of law would permit conduct which we would define as human rights abuses and thus be incompatible with a domestic thick rule of law. Is globalization likely to transform the rule by law into rule of law; or it is more

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[61] King Hassan II of Morocco, April 15, 1994, cited in Hainsworth, *ibid*.

likely to diminish the thick or quasi-thick version to accord with one more globally acceptable or convenient?

Developments in the scope, meaning and role or function of the rule of law have significance for Canadian jurisprudence because of the importance of the concept in the Canadian constitutional framework. The Supreme Court of Canada's conception of the rule of law is, of course, a domestic conception used in a domestic context. Is it vulnerable to a narrowing of its scope—a neutralizing—in order to reflect the development of a global functional or managerial rule of law? Will it be necessary to apply two visions of the rule of law: one quasi-thick for domestic consumption and one—thin—in order to be able to play in global markets and enforce international norms. Which applies when international norms have been incorporated into domestic legislation? If the domestic version is no longer "privileged," will there be a menu of "rules of law," one suitable for international trade, one for human rights, one for criminal law?

For judicial decision-makers, this has enormous impact. Domestic decision-makers, including judges, may consider international norms in their decisions and international conventions may be incorporated into domestic law; France Houle, for example, will consider this question in relation to human rights law. As one observer has pointed out, one consequence of these developments—at the global level—has been "the tremendous growth of private international authority" and "the increasingly important role played by domestic regulatory agencies such as independent central banks that operate relatively autonomously from the structures of political accountability."[62] For a country like Canada, with, comparatively speaking, a highly, albeit decrea-singly, regulated economic system, the issue is the effectiveness of regulatory regimes in the face of *de facto* governance by non-regulated global economic institutions and transactions. This question of international or global restraint on state authority is addressed by Gilles Trudeau in the labour law context in his paper in this volume.

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[62] Jayasuriya, *supra* note 51 at 445.

B. Private and International Adjudicative Bodies

A more direct challenge to domestic sovereignty is that to domestic judicial systems which are being displaced by private decision-makers, that is, non-state actors, acting outside the realm of publicly enforceable decision-making, a development to which Jonnette Watson Hamilton's paper on international commercial arbitration speaks. In some ways, this resort to private decision-making echoes the Law Merchant which developed to adjudicate mercantile disputes early in the development of international trade.[63] But to what extent does the rule of law encompass international private decision-making based on privately developed norms or rules which have not necessarily received approbation by the state? Scheuerman describes international business arbitration as "highly discretionary and probably ad hoc in character ... [and] resembl[ing] a system of private self-regulation."[64] It is worth noting, perhaps, that one might describe labour arbitration—in place for a half century or so—in only slightly less extreme terms. This raises the question of the significance of a court system to our understanding of the rule of law. For Dicey, the existence of the "ordinary courts" was vital to a regime based on the rule of law; this principle has been broadened—or compromised—in Canada even in the domestic sphere with the growth of administrative tribunals. Yet for some theorists the place of the courts is less imperative for the very reason that "both judicial and enforcement mechanisms remain notoriously underdeveloped in international private and public law."[65] Scheuerman believes that weak enforcement mechanisms are irrelevant to whether an institution has a "legal character," but one might argue that the significance of an independent judicary to the concept of the rule of law goes beyond providing a "legal character."

From another perspective transnational decision-making bodies, public rather than private institutions, may have an effect on states and state actors, but only as long as the states accept their authority. An example is the International Criminal Court, also the subject of a presentation in this conference, by Hélène Dumont. Interestingly, Scheuerman compares the lack of enforcement mechanisms for international institutions to the lack of the

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[63] See W.A.W. Neilson, "Some Legal Badges of Economic Globalization from Rome to the WTO and Regional Trade Agreements" in this volume.

[64] Scheuerman, *supra* note 23 at 7.

[65] *Ibid.*at 4.

enforcement mechanisms of the United Nations: it is correct that the United Nations continues to exist as a legal body; the question is its effectiveness and its ability to control powerful states arguably intent on ignoring the rule of law in the international context. The comparison breaks down because the lack of these enforcement mechanisms among global economic forces does not prevent their having a significant impact. The lack of adherence to the rule of law does not pose a challenge to the effectiveness of these global institutions, but rather the success of these institutions poses a challenge to the continued significance of the rule of law.

C. A Universal Rule of Law

Even in the relatively homogenous western nations, there is not agreement on the meaning or scope of the rule of law, particularly between a procedural and normative model. In practice, however, the Canadian version, while sounding like a "thin" version is so closely tied with democratic values that it can be considered at least a quasi-thick version. The same debate occurs at the international level. Some commentators believe that the exact meaning of the rule of law is not particularly important, as long as some basic elements are recognized and applied, primarily for the purpose of establishing stability (the functional view) or of protecting citizens from overarching government (the normative view). Similarly, for some observers, the rule of law can co-exist with different forms of government, while for others, it is more compatible with democracy than with any other form and except in the narrowest sense (more Carothers' rule *by* law than rule *of* law) is incompatible with authoritarian forms. Rule *by* law characterizes many economically emerging countries which want to encourage trade but the governments of which are not prepared to subordinate their power to that of the law (Carothers suggests that Malaysia, Taiwan, South Korea and "even China" fit into this category, to a greater or lesser degree, as well as many states of the former Soviet Union and the sub-Saharan African countries). We should not assume, however, that the rule of law plays the same role—or lack of role—in all economically emerging countries or in all countries which may lay claim to a particular philosophical heritage.[66]

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[66] Peerenboom briefly outlines the role of the rule of law in many states reflecting "Asian values" or, preferably, "values in Asia," such as Vietnam (in a category of its own), China, Malaysia, Singapore, Hong Kong (as one group) and the Philippines, South Korea, Taiwan, Thailand, Indonesia and India (a second group) in "Varieties of Rule of Law" *supra* note 5 at 15-31.

Despite the obvious difficulties, Bouloukos and Dakin argue, however, that it is desirable to develop an "Universal Declaration of the Rule of Law," in part because the notion of universal human rights has been divisive and because a common meaning is necessary to its international application.[67] They maintain that there has not been a similar division around the notion of the rule of law; however, this is likely because its meaning has been flexible, not only as between emerging nations and western nations, but even within western nations. As we have seen, there is no single or overriding or predominant definition of the "rule of law," particularly once one moves beyond minimal procedural requirements and does not ascribe a normative value to the content of laws. Since the concept is culturally specific in many ways, it may be difficult to develop a universally accepted meaning. Whatever the difficulties within a nation-state, the challenge to develop a thick version of the rule of law at the international level is far greater and far more significant for the overlay of a global rule of law over the domestic version. Peerenboom, for example, suggests that "[a] thin theory ... facilitates focused and productive discussion of certain legal issues among persons of different political persuasions" and "cross-cultural dialogue," since "criticisms are more likely to be taken serious and result in actual change given a shared understanding of rule of law"[68] and suggests that while "[r]ule of law is a protean concept, and rule of law discourses in Asia and elsewhere encompass multiple strands ... the requirements of a thin rule of law are widely shared and provide a certain degree of universalism."[69] In the global context, there are two dominant concepts of the rule of law. One view aligns it with democratic systems, the other sees it as a management tool, to ensure economic.[70] The latter understanding is more or less neutral as to type of government, the former is obviously not. The latter addresses the ordered system of rules which must exist if the economy is to be advanced. How can corporations do business in the emerging capitalist economies if they do not have confidence in the rules governing contract and property law, for example? But it does not require, at least at a sophisticated level, a twinning

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67 Bouloukos & Dakin, *supra* note 22.

68 Peerenboom, "Varieties of Rule of Law" *supra* note 5 at 7-8.

69 *Ibid.*at 45.

70 The veneer of the rule of law may also serve to legitimate one version of history over another through fault-finding for national wrongs: D.M. Paciocco, "Defending Rwandans Before the ICTR: A Venture Full of Pitfalls and Lessons for International Criminal Law" in A.-M. Boisvert & H. Dumont, eds., "La voie canadienne vers la Cour pénale internationale: tous les chemins mènent à Rome" (Montreal: Éditions Thémis, 2004) 97.

with a particular form of government. As long as they know that they will not be thrown into prison or worse at the arbitrary whim of the authorities, those doing business in an autocratic state need only to be satisfied that those with whom they do business will be compelled to abide by their agreements. To the extent that autocratic governments *might* be more vulnerable in these days of capitalist triumph and Internet export of western culture and expectations, democracy might seem a more stable form of government and in that sense, it is instrumental rather than normative. And, of course, individuals and corporations might have some degree of commitment to human rights and other values which make working in autocracies less appealing, a commitment which is perhaps reinforced by domestic expectations or a global NGO movement. In these cases, corporations will accord with the systems they find in the countries in which they do business, even while attempting to satisfy the values of their countries of origin.[71]

The impetus for the development of the rule of law may affect whether it serves only a regulatory function or whether it is intended to advance or reflect other interests and values. One example illustrates this point. The early capitalists in post-*perestroika* Russia benefitted from the breakdown of the existing legal system, not only to engage in clever economic manoeuvering, but also to bolster their positions with criminal activity, the very situation which made it difficult for foreign businesses to do business; now, however, these new capitalists are interested in consolidating their gains and protecting their economic position. Thus Mikhail Khodorkovsky, estimated to have a fortune of $7.2 billion (U.S.), acquired from early and continued involvement in the Russian privatization process, is said to have established his fortune in a typically Russian manner; he is now quoted as saying that "[t]ransparency and good corporate governance are the rules of the game now ... The more developed our market, the stricter those rules need to be."[72]

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[71] John McWilliams provided some examples in his discussion of how Nexen, among other corporations, do business in developing countries in his presentation to the CIAJ Conference in Banff.

[72] C. Wheeler, "Is Russian oil tycoon stepping on the toes of President Putin?" *The Globe and Mail* (July 9, 2003), A9. Khodorkovsky was later arrested and charged with fraud, tax evasion and forgery; on one interpretation, his arrest was Putin's response to Khodorkovsky's engagement with the political process and on another interpretation, it was a clear statement of Putin's determination to push through his economic reforms: J. Strauss, "Billionaire's arrest raises fears about fate of Russian reforms" *The Globe and Mail* (November 1, 2003) A9.

Some commentators find the linking of the rule of law with economic development counterintuitive. Owen Fiss, for example, suggests that this association "would deny the autonomy of law and ignore the fact that [the] end of law is justice, not economic growth."[73] Yet in some ways the rule of law has always been associated with economic order: the need for rules upon which merchants could rely. Indeed, it has been suggested that there is less need for the rule of law—in the sense of a positive system of rules—in the international context than was the case in the past. Rules were intended to ensure some level of stability between the making of a contract and the fulfillment of the contract which could take months or even longer in a world of slow boats and no electronic communication.[74] In contrast to the view that the rule of law may be less necessary today, however, at least in the economic arena, the more general view is that it is more necessary than ever. Thus "economic gobalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand."[75]

As Fiss observes, "neoliberalism" or the emphasis on the market as the main mechanism for ordering economic relations—either a characteristic or consequence of globalization—has been accompanied by an increase in laws in places such as Latin America. Property law and contract law, for example, are necessary to successful or efficient economic relations. This "narrow instrumentalization" of law ignores, Fiss argues, the status of law as "an autonomous institution that serves a rich panoply of values, a good number of which, such as political freedom, individual conscience, and substantive

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[73] O.M. Fiss, "The Autonomy of Law" (2001) 26 Yale J. Int'l L. 517 [HeinOnLine] at 517.

[74] Scheuerman, *supra* note 23 at 17:

> "Legal security is clearly a time-bound concept: legal security is primarily a demand that relevant features of the *future* remain relatively predictable and thus manageable... When economic transactions can take place across continents at a dazzling pace, the perception of the role of legal security and stability is transformed. Of course, capitalism always necessarily requires an indispensable minimum of secure legal institutions (most obviously, certain legal guarantees of private property). But beyond that minimum, the compression of time and space probably reduces the economic actor's sense of dependence on an extensive set of relatively stable general legal norms."

Indeed, less stability, that is, greater discretionary decision-making, may be desirable "[i]n a world in which economic success requires speedy reactions to complex, ever-changing movements of vast quantities of goods and services" *ibid.* at 18.

[75] Carothers, *supra* note 13.

equality, are unrelated to the efficient operation of the market or to economic growth."[76] The issue is whether law as an autonomous institution reflecting these values is a consequence of the rule of law or part of the meaning of the rule of law. Again, is the rule of law a procedural or substantive concept; are we confusing rule by law and rule of law? Does it, for example, merely allocate power among government institutions or bodies or does it, in addition, have something to say about the kinds of laws that need to be enacted and implemented, laws that may not be compatible with market efficiency but which advance values which Fiss identifies as "social justice" values?[77]

Some observers have gone so far as to suggest that globalization requires something less than even a functional rule of law, that the rule of law might be incompatible with globalization. Scheuerman argues that "a careful examination of novel forms of legal decision-making most closely connected to economic globalization shows that they exhibit few of the virtues typically associated with the traditional ideal of the rule of law." In contrast to the rule of law criteria, "[e]conomic globalization relies overwhelmingly on ad hoc, discretionary, closed, and non-transparent legal forms fundamentally inconsistent with a minimally defensible conception of the rule of law."[78]

Chibundu frames the issue as "whether the consequences of globalization have created an international community that can be subjected to standardized rules," given that legitimacy relies on community acceptance flowing from shared norms and expectations.[79] He concludes that what he calls the "'two spaces of globalization'" appear in the rule of law: one arises from "technocratic elitism" and the other is manifested in "weakened States" replaced by an active civil society comprised not only of state actors but of non-state actors, "notably human rights and charitable groups, that respond to crises without regard to national frontiers."[80] The ease of information flow suggests, he says, that "we are all going through the same experiences. In this atmosphere, it is tempting to see law, particularly the rule of law, as simply

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[76] Fiss, *supra* note 73 at 519.

[77] *Ibid*. at 520.

[78] Scheuerman, *supra* note 23 at 3.

[79] Chibundu, *supra* note 18 at 107-108. Also see Peerenboom, "Social Networks" *supra* note 20.

[80] Chibundu, *ibid.* at 114-115.

another commodity easily manufactured according to well-delineated specifications and readily sold across borders and cultures."[81] This is a merely a higher level debate of that which concerns the substantive nature of the rule of law at the domestic level.

D. Global Citizenship

While there may be much talk about the universalizing of the rule of law, having it apply in countries not predominantly governed by it (these countries may be highly regulated as a way of the authorities' maintaining power, but they are not subject to a rule of law that contains authority), the rule of law is heavily determined by national norms and values. Its operationalization, beyond the first level of process, in the Canadian context, relies on a governmental capacity to provide the conditions under which the rule of law can flourish. In Canada, the rule of law is viewed as interrelated with democracy, citizen autonomy and vindication of legal rights through meaningful access, if not to courts, at least to legitimate decision-making bodies the decisions of which can be enforced. Rapid and intensified globalization has raised questions about the government's capacity—and will—to maintain these conditions and "to promote outcomes more beneficial for society as a whole" than are likely to be achieved by market forces.[82] Enforceability of rules becomes more difficult when external players are involved and extrajurisdictional issues come into play. Thus globalization may diminish the individual state's capacity to protect its citizens, on the one hand, while the growth of international standards invokes the notion of shared "rights" or "claims," on the other hand. For some commentators, these phenomena converge in the notion of global citizenship.

One of the questions raised by global citizenship and the changing nature of international law (to establish standards to which citizens can lay claim) is the relationship between the citizen and the state. It has been suggested that "[t]hese moves towards global normative governance seem like a dramatic encroachment on the sort of sovereignty that allowed the state to dominate the political and moral imagination of individuals and their political communities, lending such powerful credibility to the Westphalian

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[81] *Ibid.* at 115.

[82] Brawley, *supra* note 41 at 61. Brawley argues that corporations might prefer a regulated state because such a state is more likely to protect their investment: *ibid.* at 62-63.

architecture of a statist system of world order."[83] The state, after all, not only asserts authority against other states, but also claims a particular relationship with its citizens based on duties and claims on both state and citizen. The growth of international bodies, including multinational corporations, compels us to examine another component of the rule of law: the relationship between the individual and the state. Recall that one component of the domestic rule of law is that it governs the relationship between the individual and the state. One answer to what may be an ever-growing distance between individual and decision-maker is the notion of global citizenship, a concept which can be defined either as referring to the universalization of human rights or as involving "new structures [that] may allow, or require, individuals to see themselves not only as citizens of their 'own' state, but as global citizens whose obligations stretch to all fellow human beings."[84]

As Axtmann points out, "[t]he success of the nation state in the last two hundred years or so, as well as its universality and legitimacy, were premised on its claim to be able to guarantee the economic well-being, the physical security and the cultural identity of the people who constitute its citizens."[85] In fact, not all nations do provide or intend to provide economic well-being or physical security for their populations, and to the extent that other nations interact with them, are nevertheless considered legitimate. But Axtmann's general point is correct. Equally valid is his point that even for states that either do or purport to accomplish these goals, it is becoming more difficult for them to do so. Because of transcendent organizations and the diffusion of sovereignty, the identification both of "the people" and the entity which can be held accountable will become problematic.[86] Fiss argues that without some grounding in the support of the population, tribunals intended to support human rights are inconsistent with democracy, thus reflecting what may be a conflict between democracy and justice. At the international level the rule of law does not have that grounding.[87] Equally interesting is how

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[83] R. Falk, "An Emergent Matrix of Citizenship: Complex, Uneven, and Fluid" in Dower & Williams, ed., *supra* note 41 at 15, 17-18.

[84] O. O'Neill, "Foreward" in Dower & Williams, eds., *supra* note 41 at xi-xii. Also see C. van den Anker, "Global Justice, Global Institutions and Global Citizenship" in Dower & Williams, *ibid.* at 158, 167.

[85] R. Axtmann, "What's Wrong with Cosmopolitan Democracy?" in Dower & Williams, eds., *ibid.* at 101.

[86] *Ibid.* at 102.

[87] Fiss, *supra* note 73 at 523ff.

compatible a rule of law developed with the approval of a relatively homogeneous population in a nation-state will be with a rule of law developed from a widely heterogenous global population.

Under the Westphalian system, states were subjects and individuals objects of international law. "Transnational redress radically reconfigures our conception of the state [which is] stripped of its sovereign pretension to be above the law and of its insistence that an individual had neither rights nor duties on the international level since all authority derived from the nation-state."[88] States still decide the *indicia* of citizenship, including benefits and duties, as well as the process by which non-citizens are entitled to citizenship and the differences that exist between citizens and non-citizens (and between persons born to citizenship and naturalized citizens). Nevertheless, the growth of a more direct relationship between individuals and international norms requires us to think about the rule of law as it applies to Canada as part of an international system and not merely as a sovereign state. It also requires consideration of the role of "citizen groups" in determining the appropriate interpretation of relevant international norms, an issue which Jennifer Koshan's contribution to this volume addresses.

Held argues that while national sovereignty has not been "wholly subverted," "there are significant areas and regions marked by criss-crossing loyalties, conflicting interpretations of rights and duties, interconnected legal and authority structures and so on, which displace notions of sovereignty as an illimitable, indivisible and exclusive form of public power;" thus "new types of 'boundary problem[s]' will arise."[89] For Held, the solution is to develop democratic systems and processes which transcend nation-state boundaries, as well as recognizing local authority with corresponding multiple citizenships.[90] At the least citizenship involves duties and responsibilities, "loyalty" by citizens to the state of which they are citizens and protection of the citizens by the state. Citizens are granted formal rights but a broader understanding of "citizen" helps to determine the extent to which fundamental principles apply to any given individual. Thus the rule of law applies to everyone, whether legally citizens or not. If our understanding of "citizen" extend to the global citizen, what is the impact on the rule of law?

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88 Falk, *supra* note 83 at 18.

89 Held, *supra* note 41 at 98

90 *Ibid.* at 100.

How might a different understanding of our obligations to citizens or residents affect the application of the rule of law to issues arising from immigration and refugee status cases? How would a "global" understanding of the rule of law be incorporated into our constitutional interpretation of this foundational principle? As Scheuerman points out, globalization has resulted in the massive movement of peoples across borders to which countries have responded by enacting "repressive" and discretionary immigration codes and in the growth of international crime which has resulted in the "weakening [of] the legal integrity of criminal codes."[91] Are the subjects of these codes local citizens, subject to a rule of law enriched by association with democratic values, or global citizens, subject to a managerial rule of law weak enough to gain consensus from the least democratic nations?

CONCLUSION

That most fundamental of Canadian constitutional principles, the rule of law, faces challenge from the development of a parallel transnational rule of law, the form of which will emerge from potentially competing interests, economic development and advancement of human rights. Is it possible to universalize the rule of law and still maintain Canada's domestic understanding of the concept (or even maintain the ongoing debate about the evolution of the principle to include more substantive measures)? Or will it be necessary to dilute the stronger concepts to accommodate countries with less willingness to accept anything other than the minimum process criteria? These developments may ultimately compel the judiciary to choose between competing rules of law, particularly when applying international norms or standards, one "home-grown" and the other developed in conjunction with the international norms or standards at issue. As for the principle itself, its continued dominance and significance in Canada's constitutional order may

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[91] Scheuerman, *supra* note 23 at 15. In this regard, the globalization of terrorism has led to restrictions of civil liberties which have been considered a fundamental element of the rule of law.

be weakened as decision-making moves offshore, thus reducing even further the significance of the domestic courts.

Canadian Constitutionalism, the Rule of Law, and Economic Globalization

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We are in the midst of a new rights revolution, it is claimed.[1] After the fall of the wall in Berlin, and the collapse of the Soviet empire, new and old nation states are emerging out of the yoke of totalitarianism, apartheid, or state socialism and rearranging their constitutional systems to embrace human rights and freedoms. The Canadian legal system is viewed as an example for many of these countries, having adopted a model of rights less steeped in tradition and in the rigidities of categorical thinking associated with the United States Constitution.[2]

At the very same time, there has emerged a corresponding push for the free movement of goods, services, and capital across national frontiers. The World Trade Organization helps to oversee the operation of non-discriminatory markets. International financial institutions, such as the World Bank and IMF, use their economic influence to advocate the downsizing of government and deficit reduction through tax concessions and the selling off of public enterprise. Democratic self-government is viewed as untrustworthy in this new environment. Limitations on government action through legally-enforceable mechanisms, such as NAFTA's investor rights, [3] are viewed as a preferable means of safeguarding the gains made towards global free markets in the post-communist era.

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1 See, for instance, M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000) and C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

2 See L. Weinrib, "Constitutional Conceptions and Constitutional Comparativism" in V.C. Jackson & M. Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, Conn.: Praeger, 2002) 3.

3 See D. Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 UTLJ 499.

We then are compelled to ask: is the correspondence between a nascent global human rights regime and a strengthening of the rules and institutions of economic globalization mere coincidence? In my view, there is a connection between the general tendency towards open markets and limited government. In a world where the market rules, where structural adjustment programs mandate legal reform that privilege economic interests, states increasingly are under pressure to adopt constitutional regimes that replicate the model upon which economic success is more likely to be secured.

This relationship between individual rights and markets was noticed in earlier times. James Madison famously admitted that US constitutional design was intended to safeguard the interests of the propertied from dispossessed factions.[4] Even constitutionalism in the United Kingdom has been portrayed as a vehicle for preserving vested interests and as prophylactic to class rule,[5] a view that has been associated with Oxford Vinerian Professor of Law, Albert Venn Dicey.[6] Dicey's idea of the 'rule of law' has taken on a life of its own, being conscripted by proponents of both human rights and market freedoms.[7]

A Canadian version of this tendency is represented in the recent work of Patrick Monahan. Monahan argues that the *Canadian Charter of Rights and Freedoms* guarantees the "rule of law"—expressly mentioned only in the Preamble to the *Charter*, together with a reference to the "supremacy of God"—and that this functions as a limitation on governmental power similar to other Charter rights and freedoms.[8] The rule of law, Monahan insists, specifically prohibits the arbitrary treatment of citizens by

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4 A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, ed. by C. Rossiter (New York: Mentor Books, 1961) at 78-79.

5 See references *infra* note 27.

6 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (N.Y.: St.Martin's Press, 1960) [hereinafter "*Law of the Constitution*"] and A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London: Macmillan, 1920).

7 I explore this phenomenon in D. Schneiderman, "Investment Rules and the Rule of Law" (2001) 8 Constellations 521.

8 P.J. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 Osgoode Hall Law Journal 411 and P.J. Monahan, *Constitutional Law* (Concord: Irwin Law, 1997) at 84-85, 128-130.

"expropriating contractual rights", though there is no prohibition on impairing contractual obligations as in the US Constitution.[9] His argument was precipitated by the Government of Canada's decision to cancel contracts to privatize Terminal 2 at Toronto's Pearson Airport. A decision to privatize was finalized during the brief tenure of Prime Minister Kim Campbell and the reversal of this decision was one of the first acts of the new Liberal government under Prime Minister Jean Chretien in 1992. The Government limited recourse to the courts and capped damages arising from the cancellation of the contracts. Monahan, along with several other leading constitutional lawyers appearing before a Senate Committee, maintained that the federal government offended limiting principles they associated with the rule of law: a limitation on government implied by the Constitution of Canada. A version of this rule of law principle appears to have been adopted by the Supreme Court of Canada in the *Quebec Secession Reference*. In one passage, the Court indicated that the unwritten constitutional principles it had identified—including those of "constitutionalism and the rule of law"—could "in certain circumstances give rise to substantive legal obligations... which constitute substantive limitations upon government action."[10]

This penchant for expanding constitutional limitations beyond what is fairly implied by constitutional text is, in my view, a dangerous trend[11] which complements well the global movement towards limited state action in regard to market matters. The rules and institutions we associate with economic globalization have precisely the objective of isolating markets from politics by limiting, through legal means, the capacity of self-governing communities to take measures for the common weal. I argue in this paper that this does not sit well with an understanding of Canadian constitutionalism that is premised on the idea of "pluralism". Much work on legal pluralism concerns the multiplicity of legal orders at work in any single legal system, though they may not be recognized as such by the "official" legal system.[12] I draw here on certain normative suppositions of

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9 Monahan (1995), *ibid.* at 415.

10 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 54.

11 See also J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389.

12 See M.-M. Kleinhans & R.A. Macdonald, "What is *Critical* Legal Pluralism" (1997) 12 Canadian Journal of Law and Society 25; J. Griffiths, "What is Legal Pluralism" (1986) 24 Journal of Legal Pluralism 1; H.W. Arthurs, *Without the Law: Administrative*

legal pluralist thought, namely, that self-governing communities should have the capacity to construct their own legal orders and that any theory of constitutionalism should accommodate these differing expressions of self-government. I want to suggest that Canada's constitutional order gives expression to this version of pluralism, not just as regards linguistic or cultural differences, but as regards the relationship between states and markets. Canada's constitutional order traditionally has tolerated a range of ideological approaches to this relationship so that, rather than foreclosing options to state-market problems, Canadian constitutionalism has enabled the imagination of what Taylor calls "alternative futures".[13]

In the first part of the paper, I examine some of the text, structure, and jurisprudence of the Constitution in order to suggest that Canadian constitutional law traditionally has been one that enables rather than disables government action in the realm of the economy. In this way, the constitution facilitates pluralism in state-market relations. It does so despite pressures from economic actors abroad, as I show in an early twentieth-century dispute over the capacity of the Ontario legislature to make laws that took public control of hydro-electricity development in the province. This tendency should not have been thwarted by the arrival of the *Charter* in 1982. Rather, this pluralistic view, I argue, complements the Charter reasonably well. In the second half of the paper, I turn to some contemporary Supreme Court of Canada decisions that signal a worrisome departure from the premises of pluralism. In my view, the Court has, on occasion, gone too far in tilting constitutional interpretation in ways consonant with the values of economic globalization by limiting unreasonably legislative power over economic subjects.

I want to argue that the contemporary promotion of individual rights through constitutional means working in conjunction with the values associated with economic globalization may combine to threaten important Canadian constitutional values. In my view, we are at a critical juncture in the history of Canadian constitutional law. The Canadian judiciary is being drawn into this struggle over the future of rights, economy, and democracy

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Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985).

[13] C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 183.

in Canada. I suggest here a judicial path both that resists this connection and that remains faithful to the Canadian constitutional value of pluralism.

I. ENERGETIC CANADIAN CONSTITUTIONALISM

Viscount James Bryce, a colleague of Dicey's at Oxford, subtitled his little book on Canada: "an actual democracy."[14] Written in the early twentieth century, Bryce described Canada's constitutional regime as more democratic than in the United States. This was because legislative power in Canada was "legally boundless". "Were there any revolutionary spirit," Bryce wrote, changes could swiftly be brought about by Parliamentary legislation.[15] Bryce grossly exaggerated federal power, but the observation captures an important aspect of Canada's constitutional design in 1867. Though divided, legislative power is complete as between the two levels of government.[16] In contrast to the style of constitutional limitation in the US—limits which disable legislative action over a variety of economic subjects (by guaranteeing property and contract rights, for instance) —Canada's constitutional regime of federalism largely is unbounded. It would have been apparent to Bryce that Canadian legislative authority was "absolutely sovereign"—that, in Dicey's famous words, it virtually "could make or unmake any law whatever."[17]

There were, to be sure, sources of limitations exercised early on in Canada's post-confederation history. W.P.M. Kennedy shows us that federal authority to disallow provincial legislation was exercised in ways that replicated protections found in the US Bill of Rights.[18] John Willis similarly describes the common law presumptions of statutory interpretation as performing constitution-like functions. These presumptions, such as the requirement, absent clear and plain language, of compensation in the event of an expropriation, acted as an "ideal constitution" for England and

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[14] J. Bryce, *Canada: An Actual Democracy* (Toronto: Macmillan, 1921). This appears to be a reprint of the chapter on Canada originally published in J. Bryce, *Modern Democracies* (New York: The Macmillan Company, 1921) at 455.

[15] Bryce, *Canada*, *ibid.* at 17, 41.

[16] A.H.F. Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) at 64-67.

[17] Dicey, *Law of the Constitution*, *supra* note 6 at 39-40.

[18] W.P.M. Kennedy, "The Nature of Canadian Federalism" in Kennedy, *Essays in Constitutional Law* (London: Oxford University Press) 27 at 49.

Canada.[19] These kinds of impediments either fell into disuse (in the case of the power of disallowance) or proved only to delay, and not to prevent, legislative interventions in the marketplace.

The point was proven by Dicey himself in a little known episode in early twentieth-century Ontario history.[20] The Ontario government, led by Minister without portfolio Adam Beck, was proceeding with a program for public hydro-electric power in Ontario. Beck's Hydro-Electric Power Commission entered into a series of contracts with southern Ontario municipalities for the provision of electric power drawn primarily from the Niagara River. As required by provincial municipal law, municipalities in the province secured the approval of ratepayers to by-laws stipulating the contractual terms under which the municipality would pay the Commission for electric power.[21] The financial terms of these contracts, however, varied from those which had been approved by local electorates and therefore Beck rushed into passage legislation in 1908 empowering mayors to approve the contracts though different from the terms approved by ratepayers.[22] After suits were launched challenging the validity of these contracts[23] and fearing yet another year of delay, Beck pushed through a second statute in 1909 validating the contracts, staying all pending litigation, and declaring that municipal contracts should "not be open to question and shall not be called into question on any ground whatever in any court but shall be held and adjudged to be valid and binding."[24]

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[19] J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Canadian Bar Review 1 at 21.

[20] Much of this history is drawn form C. Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government 1867-1942* (Toronto: University of Toronto Press, 1981) at 55-64.

[21] *Beardmore* v. *Toronto*, (1909) O.W.R. 1262 at 1263 [hereinafter *Beardomore*].

[22] *An Act to validate certain By-laws Passed and Contracts made pursuant to "An Act to Provide for the Transmission of Electrical Power to Municipalities"* S.O., 8 Edw. VII., c. 22.

[23] See *In Re By-Law No. 904 of the Town of Galt*; *Scott* v. *Patterson* (1908), 17 O.L.R. 270 (Sup. Ct.); *Horrigan* v. *Port Arthur* (1909), 14 O.W.R. 973, aff'd (1909). 14 O.W.R. 1087 (Div. Ct.); *Abbott* v. *Trenton* (1909). 14 O.W.R. 1101 (Ex.D.).

[24] *An Act to Amend an Act Passed in the 7th year of His Majesty's Reign, Chapter 19, intituled "An Act to Provide for the Transmission of Electrical Power to Municipalities," to validate certain contracts entered into with the Hydro-Electric Power Commission of Ontario, and for other purposes*, S.O., 9 Edw. VII., c. 19, ss. 4, 8; Armstrong, *supra* note 20 at 57-58; "Sir James Whitney's Invasion of the Rights of Municipalities" (1909) 45 Canada Law Journal 258.

According to W.E. O'Brien, the legislation interfered with "vested rights in order to carry out some object of supposed public utility."[25] O'Brien and others insisted that such measures were beyond the constitutional capacity of the provincial legislatures and, in any event, should be disallowed by the federal Minister of Justice. It appears to have been the editor of the *Toronto Sun* who secured the opinion of Professor Dicey.[26] Subsequently published in the *Canada Law Journal*, Dicey called the provincial measures "unjust and impolitic." However, there was nothing in the BNA Act, Dicey wrote, "which provides that a law passed by a provincial legislature shall not be palpably unjust," for the "obvious unfairness of a law can hardly affect its validity if the law falls within the terms of the BNA Act."[27] The only remedy available, opined Dicey, was to petition the Governor General for disallowance (he could hardly "conceive a stronger case") or seek an amendment to the BNA Act from the Imperial Parliament "limiting the power of legislatures to interfere with acquired rights and with the validity of contracts" (though such an amendment would "hardly be obtained ... unless it were obviously desirable by the people of Canada"). [28] Despite concerns expressed by British financial opinion (Finance Minister Fielding was warned that failure to intervene would make it difficult to borrow from London financial houses[29]) and the sympathy of Prime Minster Laurier to their pleadings (Laurier described the provincial measures as "highly improper and prejudicial"[30]), the power of disallowance would not be exercised in these circumstances. The Ontario government could proceed with its plan for public power.

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[25] W.E. O'Brien, "What Are the Functions of a Provincial Legislature?—The Distinction Between Public and Private Purposes" (1909) 45 Canada Law Journal 137 at 137. See also C.B. Labatt, "The Scope of the Power of the Dominion Government to Disallow Provincial Statutes" (1909) 45 Canada Law Journal 296.

[26] Professor Dicey, "Unjust and Impolitic Provincial Legislation and its Disallowance by the Governor-General" (1909) 45 Canada Law Journal 457 at 458.

[27] *Ibid.* at 459, 461.

[28] *Ibid.* at 462.

[29] Armstrong, *supra* note 20 at 58.

[30] *Ibid.* at 61.

Dicey's opinion seems correct in light of his understanding of federalism and the rule of law, in addition to contemporaneous understandings of Canadian constitutional law.[31] Federalism, for Dicey, acted as a prophylactic to rash legislative action. "Federalism, as it defines, and therefore limits, the powers of each department of the administration," Dicey wrote, "is unfavourable to the interference or the activity of government." Federalism meant "weak government" and "conservatism".[32] Under a federal regime, each level of government was no more than a subordinate law-making body and excesses of legislative authority would result in findings of *ultra vires*, just as would any railway authority or municipality that exceeded its jurisdiction. Where, however, a subordinate legislative body acted within its assigned jurisdiction, no question of *ultra vires* could arise.

The rule of law, for Dicey, performed similar limiting functions. Though Parliament could make or unmake any law, this dogma was "not worth the stress here laid upon it",[33] for courts always could supervise legislative activity in the exercise of their judicial review functions. It was at this stage that his "kindred conceptions" of the rule of law—that governments operate through regular law; that no one is above the law and all are amenable to the jurisdiction of courts; and that the general rights of the Constitution arise out of particular cases[34]—would have their intended effect. Judicial review, under Dicey's conception of the rule of law, could help stem the majoritarian excesses that so worried Dicey and others of his generation.[35] Dicey's legal opinion confirmed that provincial measures

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[31] See my discussion of Dicey on the subject of federalism in D. Schneiderman, "A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century" (1998) 16 Law and History Review 495 at 501-510 [hereinafter "A.V. Dicey…"]. For contemporaneous understandings, see *Smith* v. *City of London* (1909), 14 O.W.R. 1248 (Div. Ct.) [hereinafter *Smith*]; *Beardmore*, *supra* note 21 and Lefroy, *supra* note 16 at 38-39, 82-85. On the question of whether a municipality could compete with private industry, Justice Boyd in *Beardmore* referred approvingly to *Thompson Houston Electric Co.* v. *City of Newton* 42 F. 723 (1890).

[32] See Dicey, *Law of the Constitution*, *supra* note 6 at 173, 171.

[33] *Ibid.* at 71.

[34] *Ibid.* at 188-203.

[35] See Schneiderman, "A.V. Dicey…" *supra* note 31; B.J. Hibbits, "'The Politics of Principle' Albert Venn Dicey and the Rule of Law" (1994) 23 Anglo-American Law Review 18; D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 Modern Law Review 102.

within the boundaries of their legislative authority, denying access to courts by clear and plain language, could not be preempted by the "rule of law."[36] The province of Ontario would be free, then, to experiment with a provincially-owned and operated hydro-electric utility.

The constitutional limitations associated with divided jurisdiction, so valued by Dicey, have made social and economic legal change "difficult"[37] but not impossible. According to contemporary accounts, divided authority does not so much bar governments from acting, as much as it delays the taking of swift government action.[38] In their study of intergovernmental cooperation, Fletcher and Wallace conclude that "governments have found ways and means to accomplish many, perhaps most, of their objectives." Rather than barring social policy development, the experience under Canadian federalism "has been more one of delay and frustration than of paralysis... the system rarely frustrates the popular will."[39] Indeed, the almost unanimous response of governments in Canada to the challenges posed by economic globalization—spending reductions, retreat from national standards, privatization, and the withdrawal of the state from welfare state functions—suggests that federalism is not an impediment to coordinated action. The problem of divided authority does not seem to have posed so much of a problem, once a consensus around a set of national goals is identified. The pluralism undergirding Canadian constitutional law, in other words, can be overcome through the coordinated action of national and subnational units. It is the potential competitive normativism of federalism, giving rise to the exigency of cooperation, which remains a dominant feature of Canada's constitutional order.[40]

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[36] This was the essential finding of Boyd, C. of the Divisional Court in *Smith*, *supra* note 31.

[37] J.A. Corry, "The Difficulties of Divided Jurisdiction" (A Study prepared for the Royal Commission on Dominion-Provincial Relations) (Ottawa: King's Printer, 1939).

[38] K. Banting, *The Welfare State and Canadian Federalism* (Montreal: McGill-Queen's University Press, 1982) at 68.

[39] F.J. Fletcher & D.C. Wallace. "Federal-Provincial Relations and the making of Public Policy in Canada: A Review of Case Studies" in R. Simeon, ed., *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) at 132.

[40] I rely here on R.A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism" (1998) 15 Arizona Journal of International and Comparative Law 68 at 80, though Macdonald is more disparaging of the normative opportunities offered by territorial federalism than that of non-state normative legal orders. But see A.

One reasonably might think that this pluralist view of the constitution—as enabling rather than disabling of public authority—will have altered with the arrival on the scene of the Charter. Things, however, should not have changed all that dramatically. An examination of the structure and text of the *Charter* reveals that there remains a significant degree of legislative room to maneuver, particularly as regards socio-economic subjects. Property rights, of course, were left out of the *Charter* at the behest of the provincial premiers.[41] Other, so-called, "pure" economic rights, such as an inability to interfere with the obligation of contracts, also are absent from the *Charter*. What remains is a residue of what may be called "indirect" economic rights, such as freedom of expression and mobility rights, and both of these are discussed in subsequent parts of the paper. Even in those cases where indirect rights are implicated, governments can supercede rights guarantees in those cases where they can demonstrate that a limitation is reasonable and demonstrably justifiable. In more drastic cases, governments may override certain Charter rights and freedoms under the notwithstanding clause (section 33), though it may now be that its invocation is considered illegitimate.[42]

Taken together, it is not unreasonable to suggest that the *Charter* fits well the logic of the pluralist constitutional design I have described. My concern is that the Supreme Court of Canada has not been faithful to this logic. By way of illustration, I turn first to a discussion of the guarantee of freedom of expression and then to the mobility rights guarantee.

Breton, "The Theory of Competitive Federalism" in G. Stevenson, ed., *Federalism in Canada* (Toronto: McCllelland and Stewart 1989) 457 at 460.

41 A. Alvaro, "Why Property Rights Were Excluded From the Canadian Charter of Rights and Freedoms" (1991) 24 Canadian Journal of Political Science 309 at 319-321; S. Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2 International Journal of Constitutional Law 1 at 16-27.

42 Cf. K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

II. FREE SPEECH RIGHTS[43]

Certainly, not only economic interests have been well served by the *Charter*. That they have benefited from the *Charter*, however, is indisputable. This is a conclusion the Supreme Court of Canada appears to want to resist. In the *Pepsi-Cola* case,[44] Chief Justice McLachlin and Justice LeBel, writing for the Court, distinguished between "fundamental Canadian value[s]", like freedom of expression, and those diverse interests served by the common law and "not engaged by the *Charter*. Salient among these are the life of the economy and individual economic interests."[45] Note the distinction the Court purports to make, which fits well Canada's constitutional design I outlined above. The Court, however, has not always been faithful to these presuppositions.

The record of success for business interests has been mixed, but there is little doubt that gains continue to be secured in the guise of making constitutional law. As Gregory Hein shows, "corporate interests" are actively engaging in *Charter* litigation.[46] Business firms have had some success in conscripting the *Charter* in order to resist government regulation. According to Richard Bauman, constitutional challenges "have become an important strategic device for businesses."[47]

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[43] This section draws on D. Schneiderman "Exchanging Constitutions: Constitutional Bricolage in Canada" (2002) 40 Osgoode Hall Law Journal 401 [hereinafter "Exchanging Constitutions"]. In my presentation at the Banff conference, I also made reference to some of the Court's federalism cases. Though I have omitted that discussion from this paper, the cases are discussed in "Exchanging Constitutions".

[44] *RWDSU, Local 558* v. *Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] SCC 8 [hereinafter *Pepsi-Cola*].

[45] *Ibid*. at para. 21.

[46] G. Hein, "Interest Group Litigation and Canadian Democracy" in P. Howe & P.H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 214.

[47] R.W. Bauman, "Business, Economic Rights, and the Charter" in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 58. This is a phenomenon which, curiously, escapes the attention of F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). See D. Schnedierman, "The Old and New Constitutionalism" in J. Brodie & L. Trimble, eds., *Reinventing Canada: Politics of the 21st Century* (Toronto: Prentice Hall, 2003) 243-258 at 248-250.

Nowhere is this success more apparent than in the field of commercial speech. From its modest doctrinal beginnings in *Ford*[48] to its robust articulation in *RJR-MacDonald*, [49] commercial expression under the *Charter* has proven to be a valuable resource for promoting the economic interests of corporate actors. Once it is accepted that "all expressions of the heart and mind" together with all "human activity" which "conveys or attempts to convey a meaning" fall within the scope of constitutionally protected expression,[50] then it comes as little surprise to find that the promotion of commercial products will find safe harbour in the *Charter*.

In so doing, the Court has appeared to be agnostic about the capacity of states to regulate markets. The constitutionalization of commercial speech rights, after all, need not lead necessarily to the constitutionalization of "free enterprise." Instead, the Canadian Supreme Court appears to have been more attracted to protecting the consumer's interest in receiving commercial information.[51] For the Court, constitutionalizing commercial speech has the advantage of enabling individuals to make informed economic choices, which is "an important aspect of individual self-fulfillment and personal autonomy." [52] In the interests of informing consumers, the Court even has been prepared to enter the realm of labour relations—a domain which the Court mostly has shielded from *Charter* review. The Court has identified a public interest in receiving important messages about labour disputes, either through consumer pamphleting at retail outlets[53] or via secondary picketing.[54] The juridical thrust of these cases is to value consumer interests, and this is equated with a public interest in the free flow of commercial information.[55] By constitutionalizing

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48 *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712 [hereinafter *Ford*].

49 *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

50 *Attorney General of Quebec* v. *Irwin Toy*, [1989] 1 S.C.R. 927 at 968-969.

51 *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247; *RJR-MacDonald*, *supra* note 49 at 347.

52 *Ford*, *supra* note 48 at 767.

53 *United Food and Commercial Workers, Local 1518 (U.F.C.W.)* v. *KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at 1105.

54 *Pepsi-Cola*, *supra* note 44 at paras. 34-35.

55 By endowing commercial speech with constitutional protection, the Court has helped to promote what Leslie Sklair calls the "culture-ideology of consumerism": a "set of

the interests of consumers, the Court also enhances the constitutional position of producers, though this relationship often is obscured.

The Court was more frank about this relationship in *R.* v. *Guignard*.[56] There, the Court invalidated a Saint-Hyacinthe municipal bylaw prohibiting advertising outside designated "industrial areas." Mr. Guignard erected a sign on one of his commercial properties complaining about his insurance company's delay in indemnifying him for repairs done several months earlier.[57] Justice LeBel, for the Court, embarked on his section 2(b) discussion by acknowledging the great value placed on commercial speech by the Court in previous decisions:[58]

> "The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information... The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising."

The interests of commercial enterprise now are considered equivalent to those of consumers. Perhaps this represents only a slight shift in direction. Yet it goes some distance in revealing the direction the Court has taken: that commercial speech doctrine is predicated upon the constitutional rights of producers to bring products to market through advertising.[59]

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practices, attitudes and values, based on advertising... that encourages ever-expanding consumption of consumer goods." See L. Sklair, "The Culture-Ideology of Consumerism in Urban China: Some Findings From a Survey in Shanghai" in C.J. Schultz, II, R.W. Belk & G. Ger, eds., *Research in Consumer Behavior*, *vol. 7: Consumption and Marketizing Economies* (Greenwich: Jai Press, 1994) 260.

56 *R.* v. *Guignard*, [2002] SCC 14.

57 *Ibid.* at para. 3.

58 *Ibid.* at paras. 21, 23.

59 This conclusion was embraced readily by the Ontario Court of Appeal in *Vann Niagara Ltd.* v. *Oakville (Town of)* (2002), 60 O.R. (3d) 1 (C.A.). The case concerned a by-law of the municipality of Oakville which prohibited commercial billboard signs in certain designated areas. According to Justice Borins, for the majority of the Court of Appeal, commercial expression is "a key component to our economic system and therefore merits Charter protection" (at para. 17). The majority held the by-law was not a reasonable limitation on commercial speech rights. The Supreme Court of Canada reversed the finding under s.1 of the *Charter* but agreed that the billboard restriction

Though the Court rightly struck down this by-law, recognizing that consumers will have constitutional rights to engage in "counter-advertising", it is disquieting to see how far the Court has gone down the path of constitutionalizing the social relations of the market. This precisely is the objective being promoted by the rules and structures of economic globalization.

III. MOBILITY RIGHTS

Individual mobility rights have, of course, a more direct relation to economic freedom. Though the Trudeau project of a *Canadian Charter of Rights and Freedoms* was not primarily one about economic rights,[60] the mobility rights come closest to embracing the idea that attached to Canadian citizenship is the idea of limited government in the realm of markets. The *Charter*'s section 6 guarantees to citizens and permanent residents the right, subject to certain limitations, to move and take up residence in any province and to pursue the gaining of a livelihood in any province (the latter right is of most concern here). The significance of the mobility guarantees is underscored by the fact that these rights are not subject to the override clause in section 33. Complementing the *Charter*'s mobility rights is a joint federal-provincial commitment in section 36(1) to "promote equal opportunity for the well-being of Canadians". These constitutional provisions are supplemented by instruments of intergovernmental cooperation, like the *Agreement on Internal Trade* (*AIT*) and measures to enhance mobility rights in the *Social Union Framework Agreement* (*SUFA*).[61] The Constitution and its related instruments thus give voice to a conception of citizenship that has come to be understood as the primary vehicle for the attainment of wealth and happiness in the modern world, premised upon the idea of equality of economic opportunity.

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infringed s. 2(b). See *Corporation of the Town of Oakville* v. *Vann Niagara Ltd.*, [2003] S.C.J. No. 71, online: QL (SCJ) 2003 SCC 65.

60 On Trudeau's constitutional project see S. Clarkson & C. McCall, *Trudeau and Our Times, Volume 1: The Magnificent Obsession* (Toronto: McClelland and Stewart, 1990).

61 "A Framework to Improve the Social Union for Canadians" (February 4, 1999), section 2, reproduced with commentaries in (1999) 10:4 Constitutional Forum 133.

The cases indicate that economic discrimination based upon provincial boundaries will be scrutinized closely by the courts. The threshold for review under the right to "pursue a livelihood in any province", for instance, is not high. Though the section does not guarantee a "right to work", according to Justice Estey in the *Skapinker* case, there need only be some potential mobility aspect that is circumscribed to trigger *Charter* review.[62] There need not even be an element of physical movement or the taking up of a residence in another province. All there need be is a simple desire to carry on economic activity in some other province than in the province of residence. This helps to explain the result in *Black* v. *the Law Society of Alberta*.[63] In *Black*, the law society benchers sought to prohibit the establishment of national law firms. Justice LaForest, for the majority of the Court, traced the importance of interprovincial economic mobility to the original confederation project. While economic concerns, LaForest J. acknowledged, "undoubtedly" played a part in the constitutional entrenchment of mobility rights, section 6 also "defines the relationship of citizens to their country." This is reflected in the language of section 6 itself, which addresses not the structural elements of federalism but the rights of permanent residents and citizens.[64]

Viewed in this light, the rule prohibiting interprovincial law firms clearly violated *Charter* mobility rights in section 6(2)(b), even if there was no physical "movement" being frustrated. According to the Court, "the mobility element need not be a regular or prominent component", rather, there need only be some "contact" with the discriminating province.[65] It only remained for the Court to consider whether the limitation on national partnerships was justifiable in a free and democratic society. Here we might have expected a measure of deference accorded to the legislature. After all, only three years earlier in *Edwards Books* the Court indicated that in matters of socio-economic policy "a Legislature must be given reasonable room to manoeuvre."[66] The Law Society's objectives admittedly were important: they were concerned about practice by non-members, the need for local competence and expertise in matters pertaining to Alberta law,

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62 *Law Society of Upper Canada* v. *Skapinker* (1984), 9 D.L.R. (4th) 161 at 181 (S.C.C.).

63 *Black* v. *Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (S.C.C.).

64 *Ibid*. at 336.

65 *Ibid*. at 338, 340.

66 *Edwards Books and Art Ltd*. v. *The Queen* (1986) 35 D.L.R. (4th) 1 at 67.

increased liability and concerns about discipline. But these were disproportionate to the objectives sought and therefore unjustifiable.[67] According to this construction of the *Charter*'s mobility rights, the *Charter* gives expression to the objectives of the Canadian economic union and a conception of Canadian citizenship in which persons are free not only to move physically, but to contract and invest, in order to pursue economic gain.

There are a number of interesting connections between the reasoning in *Black* and the phenomenon of economic globalization. First, as Katherine Swinton has observed, since the claim concerned a right to equal treatment for out-of-province residents to invest in provincial law firms, the right to economic mobility in section 6 is analogous to the international investment rule of "national treatment" (requiring that non-residents be treated the same as residents).[68] Second, by removing the protective barriers that barred national law firms, the Court facilitated the generation of large regional and supra-national professional law firms determined to reach beyond local markets in order to keep pace with international business trends.[69]

The majority of the Court parted ways with Justice La Forest's legacy in *Canadian Egg Marketing* v. *Richardson*.[70] The Court recharacterized the mobility rights guarantee as serving human rights objectives rather than promoting economic citizenship. The case concerned Canada's national marketing scheme for the production and distribution of eggs. Quotas are allotted to egg producers in each of the provinces across Canada. Historically, egg production did not originate from Canada's Northwest Territories (NWT); consequently, no permits were ever allotted to NWT producers. Richardson, who wished to break into the egg market but was not permitted to do so under the current scheme, challenged the authority of the federal Canadian Egg Marketing Agency to bar his entry into the

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[67] P. Blache, "Mobility Rights" in G.-A. Beaudoin & E. Mendes, *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) 352.

[68] K.E. Swinton, "Courting Our Way to Economic Integration" (1995) 25 Canadian Business Law Journal 280.

[69] H.W. Arthurs & R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall Law Journal 1 at 51.

[70] *Canadian Egg Marketing Agency* v. *Richardson*, [1998] 3 S.C.R. 157 [hereinafter *Richardson*].

market. As the Court had held in *Black*, the Court in *Richardson* declared that the right to "pursue the gaining of a livelihood" in any province did not require any "physical movement" whatever. All that was required was that there be "any attempt to create wealth."[71] Though mobility rights appeared to have been infringed, the majority of the Court proceeded to read down the scope of section 6, limiting the purpose of these provisions to furthering the "human rights objective" of non-discrimination.[72] A denial of "human dignity," which has emerged as the touchstone for judicial findings of discrimination under the *Charter*'s equality rights provisions, now was prerequisite to a finding that mobility rights also had been infringed.[73]

Though egg producers in the NWT were barred permanently from participating in the interprovincial marketing scheme, the egg quota system was not primarily one that discriminated on the basis of residence. Rather, this was a scheme constructed around historical patterns of egg production. The purpose of the scheme, then, was not to denigrate the human dignity of egg producers because of their residency—it really was nothing personal. Nor was the scheme discriminatory in its effect, the Court concluded. Weighing in with a very formalistic equality analysis, the majority compared producers in the NWT with egg producers without quotas in other provinces (rather than as compared to egg producers with quotas) and concluded that they were in no worse a position.

Justice McLachlin (as she then was) in dissent was more faithful to the La Forest legacy, characterizing section 6 as promoting both the Canadian economic union and a fundamental incident of citizenship, namely, equality of opportunity without discrimination based on province of residence.[74] She would have found the scheme discriminatory and unjustifiably so: an absolute bar on new entrants from the NWT based on historical patterns of production did not further any justifiable pressing and substantial objective.[75]

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71 *Ibid*. at paras. 71, 72.

72 *Ibid*. at para. 66.

73 On this, see the opinions of Justices Iacobucci and L'Heuruex-Dubé in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

74 *Richardson*, *supra* note 70 at para. 161.

75 *Ibid*. at paras. 157, 178.

The majority justices, perhaps, were more faithful to the Constitution's overall objectives of enabling legislative activity than was the dissenting opinion. But in applying a formalistic equality rights analysis with an inappropriate comparator group, they probably were not faithful to the constitutional tenor of the mobility rights clause. It is interesting, however, that both the majority and minority justices agreed that non-tariff barriers to the mobility of capital, goods, and services that unreasonably discriminate against persons and business associations, primarily upon provincial lines[76] are constitutionally prohibited. This is a startling result in light of the fact that reform of section 121 of the Canadian Constitution along just these lines was expressly rejected in the 1980s and 1990s.

CONCLUSION

One of the defining characteristics of Canadian constitutional law has been its pluralism. The Constitution has enabled governments to give expression to a wide variety of legislative initiatives. This in turn, has enabled a diversity of ideological commitments to be given expression through social and economic legislation. In this sense, Viscount Bryce was correct. Canadian constitutional design is more democratic than its American counterpart as it accommodates political protest and keeps open a range of achievable political goals. Openness to political possibility, as political scientist Adam Przweworski argues, makes electoral competition meaningful for all interests: though losers today, we could be winners tomorrow.[77] This is precisely not the idea of democracy promoted by the rules and institutions of economic globalization. Democracy is considered untrustworthy, politics merely about self-interestedness. Constitutionalism is about shielding the market from political authority. To the extent that the current trends which I have identified continue, it will have the effect of foreclosing political alternatives, checking further our capacity for self-government.

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[76] This right is subject to laws that provide "reasonable residency requirements as a qualification for the receipt of publicly provided social services" (s. 6(3)(b)).

[77] A. Przeworski, *Democracy and Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991) at 33. Also see S.N. Eistentadt, *Paradoxes of Democracy: Fragility, Continuity, and Change* (Washington and Baltimore: The Woodrow Wilson Center Press and The Johns Hopkins University Press, 1999).

Our pluralism is under threat. Perhaps it is unreasonable to expect the judiciary to be the vanguard in resisting or even reversing these tendencies. Perhaps the most we can expect is that the judiciary remain faithful to the constitutional values of the past that will have contemporary resonance as governments move to counteract the deleterious effects of economic globalization on Canada's most vulnerable populations.

La Cour pénale internationale (CPI) : les fondations fragiles d'un droit universel et d'un forum commun supranational en matière de crimes internationaux[*]

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« La justice pénale internationale peut n'être ni pénale ni internationale sans toutefois se trahir. Une fois amputée de deux adjectifs, elle ne subsiste que comme projet : rendre justice à des crimes de masse qui regardent toute la communauté internationale en raison de leur monstruosité. Ces crimes sont monstrueux non seulement parce qu'ils nous font découvrir une atteinte inédite à ce qu'il y a d'humain dans l'homme, mais aussi parce qu'ils défient les capacités de l'ordre juridique. La justice pénale, qui est rodée pour réprimer les comportements asociaux, les transgressions privées, est prise au dépourvu lorsqu'on lui demande de juger des crimes commis par le pouvoir en exécution d'une politique, le plus souvent avec la collaboration de toute une société, et la complicité d'un droit délinquant. Comment juger alors ces crimes qui brouillent les frontières entre droit, morale et politique. »

Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner.* Pour une justice internationale, p. 12, Paris, 349 pages.

Au moment d'écrire ce texte, nous nous sommes sentis comme des jongleurs inexpérimentés qui avaient entre les mains plus de balles qu'ils ne pouvaient lancer sans risquer de toutes les laisser tomber. Ces balles, trop nombreuses pour notre dextérité, nous étaient imposées, d'abord par les éléments du titre du Colloque : *justice et participation dans une économie globale*, *la nouvelle règle de droit*, ensuite par le thème du panel : *la gouvernance mondiale*, et finalement par les exemples concrets de mécanismes de cette gouvernance mondiale : *la Cour pénale internationale (CPI) et les pratiques commerciales d'arbitrage privé*. En traitant du seul sujet qui nous a été confié, la *Cour pénale internationale*, sans égard aux autres dimensions thématiques de cette conférence, nous pourrions certes montrer plus d'habileté en jouant avec notre thème comme avec un seul gros ballon familier. Nous avons tout de même choisi

la corde raide même si nous risquons de faire les pitres avec nos maladresses en lançant toutes les balles que nous offre cette conférence. Jongler avec quelques idées reçues concernant le développement du droit pénal international et la création de la CPI : c'est là notre façon de vous présenter une certaine image de la justice pénale internationale et de son institution qui veut la mettre en œuvre, la nouvelle Cour pénale internationale. Voici donc quelques jongleries en guise de réflexions sur l'établissement d'une Cour pénale internationale dans l'ordre juridique mondial que nous exprimons sous la forme de paradoxes quand tous les thèmes du Colloque sont lancés ensemble dans les airs comme les balles d'un jongleur.

I. PREMIER PARADOXE : LA COUR PÉNALE INTERNATIONALE A UNE COMPÉTENCE RÉELLE MAIS RESTREINTE DE METTRE FIN À L'IMPUNITÉ

La Cour pénale internationale est une institution judiciaire inter-étatique créée par le Traité de Rome dont l'entrée en opération, le 1er juillet 2002, dépendait de la ratification de soixante (60) pays. À ce jour, quatre vingt douze (92) pays[1], dont le Canada, sur les cent quatre vingt onze (191) pays de la planète ont ratifié le Traité de Rome, mais plusieurs superpuissances, notamment les USA, la Russie, le Japon, l'Inde, Israël et la Chine, n'y ont pas adhéré. Ainsi, plus de la moitié de l'humanité ne s'estime pas encore concernée par un traité qui parle pourtant en son nom collectif. Toutefois, on est généralement d'avis qu'il s'agit d'un geste sans précédent dans l'histoire du droit international car les pays signataires auraient renoncé à une partie de leur souveraineté étatique en partageant l'exercice du pouvoir répressif considéré l'apanage exclusif d'un État souverain. La CPI tirerait sa légitimité au plan international du fait que, par voie conventionnelle, des États souverains ont ensemble décidé de confier à une cour supranationale une compétence sur des individus qu'ils peuvent exercer respectivement et séparément à l'échelle locale et qui les autorise à juger des criminels, ressortissants ou étrangers, dirigeants ou exécutants, soupçonnés d'avoir commis les plus

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[1] Au 5 septembre 2003, le nombre des pays ayant ratifié le Statut de Rome de la Cour Pénale Internationale est de 92. Parmi eux, 22 sont des pays africains, 23 sont des pays européens (ne faisant pas partie de l'UE), 18 sont des pays d'Amérique latine et des Caraïbes, 15 sont des États membres de l'UE, 12 sont de la région Asie et Pacifique, 1 est d'Amérique du Nord et 1 du Moyen-Orient. Voir à cet égard, le site de la CPI : http://www.icc-cpi.int (dernière visite : le 10 février 2004).

graves violations des droits de la personne à un quelconque endroit dans le monde. En contrepartie, les pays non parties au Traité, en particulier les plus puissants, seraient montrés du doigt car ils apparaîtraient, tels des monarques suprêmes, ne pouvoir mal faire selon la maxime *the King can do no wrong*[2]. Par conséquent, pour ces derniers, il n'y aurait pas lieu d'établir un forum international qui pourrait éventuellement les juger; au mieux, accepteraient-ils parfois de créer des tribunaux *ad hoc* pour juger autrui.

Selon cette première idée reçue, le monde est divisé en deux camps depuis l'établissement de la CPI : ceux qui veulent mettre fin à l'impunité de tous les responsables de crimes internationaux les plus graves et qui se sont dotés d'un mécanisme international pour y arriver[3] et les autres. À première vue, il nous paraît un peu simpliste de prétendre que seuls les pays parties au Traité se sont engagés à mettre fin à l'impunité des génocidaires du monde entier et que les autres États non signataires, par chefs d'État interposés, sont prêts à fournir un asile sécuritaire et judiciaire aux criminels de cet acabit ou bien se considèrent à l'abri de telles poursuites en se retranchant derrière la protection d'un droit pénal territorial amical d'une part ou derrière la souveraineté des États et des immunités de fonction d'autre part.

A. Compétence matérielle de la CPI et crimes universels

La Cour pénale internationale exerce sa compétence sur le crime de génocide, les crimes de guerre, les crimes contre l'humanité[4]. Le Statut criminalise les violations des droits de la personne réputées les plus graves, et communément appelées le « noyau dur » des crimes dits

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[2] André BRAËN, « La responsabilité du Monarque : Du nid de poule à Walkerton », (2002) 32 *R.G.D.* 617, 620. André Braën rappelle qu'à « l'origine et en droit anglo-saxon, le monarque était considéré comme étant assujetti au droit ainsi qu'aux tribunaux ordinaires de qui relève l'application du droit. Aussi, la maxime *The King can do no wrong* signifiait que le monarque ne jouit d'aucune prérogative lui permettant de commettre des actes illégaux. Mais on le sait, c'est tout différemment que cette maxime sera interprétée pour signifier finalement que le monarque ne peut commettre de faute et pour lui reconnaître, au moyen de diverses immunités, un statut d'irresponsabilité ».

[3] Dans le préambule du Statut de Rome de la Cour pénale internationale, « les États parties affirment être déterminés à mettre fin à l'impunité des auteurs de ces crimes et à concourir ainsi à la prévention de nouveaux crimes ».

[4] *Statut de Rome*, A/CONF. 183/9 du 17 juillet 1998, entré en vigueur le 1er juillet 2002, art. 5.

internationaux parce qu'ils portent atteinte à la paix, la sécurité et le bien-être mondial, mettent en péril la communauté humaine dans son essence et existence[5] et constituent aussi selon une conception occidentale dominante de l'être humain, un affront à la « morale internationale »[6].

Aujourd'hui, l'internationalisation des droits de la personne est un phénomène incontestable. Cela donne lieu à la manifestation d'une « conscience commune » qui s'exprime tantôt par de bons sentiments de la part de certains gouvernants, tantôt par des protestations publiques de la société civile. Cette lente maturation d'une pensée politique commune autour des droits de la personne a en quelque sorte reçu sa consécration officielle et s'est vue conférée cette portée élargie à l'humanité entière par la Déclaration universelle de 1948[7]. L'intégration de cette conception dans le discours politico juridique international à compter de cette date s'est peu à peu imposée en même temps que s'est construite l'adéquation de la notion « d'État de droit » et celle de « démocratie respectueuse des droits de la personne ». Cette philosophie a par ailleurs fait naître l'idée d'un espace de liberté pour tous les individus dans lequel l'État ne pouvait s'immiscer arbitrairement et qui leur conférait également un pouvoir personnel opposable à l'État par la médiation du droit et le contrôle d'un pouvoir judiciaire national. Aujourd'hui, cette conscience commune

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5 Préambule et article 1 du Statut de Rome :

> « Les États parties au présent Statut, Conscients que tous les peuples sont unis par des liens étroits et que leurs cultures forment un patrimoine commun et soucieux du fait que cette mosaïque délicate puisse être brisée à tout moment, Ayant à l'esprit qu'au cours de ce siècle, des millions d'enfants, de femmes et d'hommes ont été victimes d'atrocités qui défient l'imagination et heurtent profondément la conscience humaine, Reconnaissant que des crimes d'une telle gravité menacent la paix, la sécurité et le bien-être du monde, Affirmant que les crimes les plus graves qui touchent l'ensemble de la communauté internationale ne sauraient rester impunis et que leur répression doit être effectivement assurée par des mesures prises dans le cadre national et par le renforcement de la coopération internationale, Déterminés à mettre un terme à l'impunité des auteurs de ces crimes et à concourir ainsi à la protection de nouveaux crimes […] Il est créé une Cour pénale internationale […] ».

6 Danièle LOCHAK, *Les droits de l'homme*, Paris, La Découverte, 2002.

7 *Ibid*., p. 3-17. Voir aussi la *Proclamation de Téhéran* du 13 mai 1968 qui évoque l'indivisibilité des droits de l'homme et des libertés fondamentales, au paragraphe 13; N.U. Doc. A/CONF. 32/41 (1968) p. 3; la *Déclaration* et le *Programme d'action de la Conférence de Vienne* de 1993 qui réaffirment le caractère indivisible et l'interdépendance des droits humains, Doc. N.U. A/CONF.157/23.

pousse plus loin sa réflexion et elle est porteuse d'un jugement sur la légitimité des États qui sont, et c'est là un paradoxe, à l'origine des plus nombreuses violations des droits de la personne en même temps que leurs principaux protecteurs[8].

Lorsqu'un État s'engage par Traité à respecter les droits de la personne, ce qu'ont déjà fait plusieurs États en adhérant à la *Déclaration universelle* et à d'autres instruments internationaux ou régionaux semblables[9], la réciprocité des avantages que des États se confèrent mutuellement dans leurs ententes bilatérales ou multilatérales de type classique n'existe pas. À l'inverse des obligations que les États acceptent dans le champ économique, celles dans le champ de droits humains ne sont généralement ni réciproques, ni soumises à un contrôle international. Ces principes qui garantissent une certaine effectivité aux règles du commerce international, sont l'exception en matière de droits humains. En cas de violation par un État, les autres États peuvent dénoncer les violations commises, mais ils ne disposent généralement d'aucune base légale pour contrôler leur respect, ils ne peuvent prendre aucune mesure de représailles ou intervenir matériellement dans cet État. De plus, toujours contrairement à ce qui se passe dans le champ économique, il n'existe pas d'institutions internationales chargées de veiller globalement au respect des droits humains. Les États peuvent donc s'engager à harmoniser leur

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8 Pierre-Henri IMBERT, « L'apparente simplicité des droits de l'homme, réflexions sur l'universalité des droits de l'homme », (1989) 1 *R.U.D.H.* 7.

9 Karen I. LEE, « Les États-Unis d'Amérique et le Canada », dans Antonio CASSESE et Mireille DELMAS-MARTY (dir.), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002, p. 61 :

> « Les traités et les conventions forment les sources premières des obligations en droit international. Les principes fondamentaux sur l'application des traités sont définis par la Convention de Vienne de 1969 sur le droit des traités, entrée en vigueur le 27 janvier 1980. Au Canada, la ratification des conventions se fait sans l'approbation du pouvoir législatif. Néanmoins, lorsque la convention en question est d'une importance particulière, le gouvernement canadien peut demander l'approbation. Il est important de faire la distinction entre d'une part la capacité à devenir partie à un traité et d'autre part le pouvoir du pays signataire d'appliquer ce traité à ses ressortissants. Aux États-Unis comme au Canada, seul le droit national peut imposer aux citoyens des obligations que l'État a contractées en devenant partie à une convention. Au Canada, alors que le gouvernement est libre de devenir partie à un traité, le pouvoir législatif n'est pas contraint de voter une loi intégrant le traité au droit national. Un problème similaire peut être observé aux États-Unis, lorsqu'une majorité des deux tiers du Sénat est nécessaire à la ratification et à l'entrée en vigueur d'un traité, donnant donc à celui-ci force de loi ».

législation de façon à respecter ou à promouvoir les droits humains, mais ces engagements ne sont qu'exceptionnellement soumis à des mécanismes de contrôle.

De tels engagements internationaux, très souvent sans véritables conséquences juridiques internationales, peuvent cependant devenir la cause de plusieurs ennuis. Cela permet par exemple à des pays ou à leur société civile de critiquer ce qu'un État fait à ses citoyens, cela oblige un État à promettre de respecter les droits de la personne pour obtenir de l'aide extérieure de pays donateurs[10], cela peut porter atteinte à la respectabilité politique d'un pays fautif et parfois même à sa légitimité. Alors quand un État signe de tels engagements internationaux, au moins symboliquement, sa souveraine impunité peut devenir l'objet d'un regard réprobateur de la communauté internationale s'il est pris en défaut à ce chapitre[11] et ce regard contribue à saper le caractère sacré du principe de non ingérence dans les affaires internes d'un État.

Ce nouveau caractère dérangeant des droits de la personne, faut-il le souligner, ne semble pas avoir le même effet si on est le Rwanda ou les États-Unis. Mais d'ores et déjà, cet inconvénient du regard accusateur suffit pour que des États, même défenseurs des droits de la personne sur leur propre sol, manifestent de la méfiance voire de la défiance à l'égard de tout engagement général et international de respecter les droits de la personne de peur qu'on s'immisce dans leurs affaires internes et les rende un jour redevables sur la scène juridique internationale. Plusieurs de ces États prudents et frileux sont tout autant des démocraties que des dictatures stables ou instables et ils craignent de la même façon que l'on institue un mécanisme extérieur et international de contrôle de leur

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[10] Ainsi, les bailleurs de fonds multiplient les conditionnalités et les références aux droits humains, sans pour autant accepter que leurs propres institutions soient soumises à un tel respect. Stephen J. TOOPE, « Human Rights and Social Change », *IDRC Lecture*, 11 mars 2003, p. 2 :

> « Dans les sociétés occidentales, il faut prouver, semble-t-il, le bien fondé des droits de la personne, comme n'importe quelle autre valeur, avant de pouvoir les défendre et leur consacrer nos ressources sociales. C'est pourquoi on tente de démontrer en quoi les droits de la personne sont importants, que ce soit en termes de soutien à la démocratie, de gage de bonne gouvernance ou même de contribution au soulagement de la pauvreté. Toutes ces revendications reposent sur l'hypothèse de base selon laquelle la société changera en profondeur si les droits de la personne sont mieux protégées. »

[11] Human Rights Watch porte bien son nom. P.H. IMBERT, *loc. cit*., note 8.

inconduite en matière des violations des droits de la personne les plus graves et qui aurait une force juridique coercitive sur eux, ce que n'a pas le seul regard actuel, fut-il inquisiteur, de la communauté internationale[12]. À cet égard, les États-Unis ont été particulièrement vigilants de ne pas ratifier plusieurs des Conventions en matière de droits de l'Homme[13] ou les ont intégrées à leur droit interne avec de nombreuses réserves et clauses d'interprétation; ils n'ont donc pas pris la chance de se rallier aux vœux pieux dont ces traités sont souvent seulement porteurs, faute de mécanismes juridiques de sanction à l'échelle mondiale. Le Parlement européen a, quant à lui, un certain passé de méfiance en la matière; il a déjà adopté plusieurs résolutions sur les droits de la personne pour des régions en dehors de l'Union européenne mais fort peu au sujet de ses États membres[14]. Quant au Canada, il n'a toujours pas ratifié la *Convention interaméricaine des droits de l'homme*[15].

Pourtant en proclamant l'universalité des droits de l'Homme au lendemain de la Deuxième guerre mondiale, logiquement on aurait pu s'attendre au développement d'une vision commune des États sur la

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[12] La Chine, les États-Unis, l'Inde, la Russie et Israël entretiennent le même genre de méfiance.

[13] Par exemple les États-Unis n'ont pas ratifié les conventions suivantes : *Pacte sur les droits économiques, sociaux et culturels*, *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes*, *Convention sur les droits de l'enfant.* Ils ont intégré les conventions suivantes avec plusieurs réserves : *Pacte sur les droits civils et politiques*, *Convention internationale sur toutes les formes de discrimination raciale*, *Convention contre la torture et autres peines et traitements cruels, inhumains et dégradants.* Ils ont ratifié la *Convention contre le génocide* mais en l'intégrant dans le droit interne, ils ont fait deux réserves et cinq clauses d'interprétation : voir à cet égard Karen I. LEE, *loc. cit*., note 9, 462. Les informations sur l'état des ratifications, réserves et déclarations peuvent être obtenues sur le site Internet du Haut-Commissariat aux Nation-Unies pour les droits de l'homme, à l'adresse suivante : http://www.unhchr.ch/html/menu3/b/treatylgen.htm (dernière visite : le 24 janvier 2004).

[14] Voir à cet égard le *Rapport de Karel de Gucht*, A2.0329/88 cité dans P.H. IMBERT, *loc. cit*., note 8, 13.

[15] *Convention américaine relative aux droits de l'Homme*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entrée en vigueur le 18 juillet 1978, après que onze États l'aient ratifiée). *Argentine*, Barbade, *Bolivie*, Brésil, *Chili*, *Colombie*, *Costa Rica*, Dominique, *Équateur*, *El Salvador*, Grenade, *Guatemala, Haïti*, *Honduras*, Jamaïque, *Mexique*, *Nicaragua Panama*, *Paraguay*, *Pérou*, République dominicaine, *Surinam*, *Uruguay*, *Venezuela*. (Au 31 mai 2000 – Les dix-huit États en italique sont ceux ayant reconnu la compétence de la Cour).

question des violations les plus graves à ces droits universels et à la reconnaissance d'un droit de regard mutuel pouvant donner lieu à des sanctions dans l'ordre juridique mondial. Qu'en est-il au juste?

B. La CPI : Un droit de regard mutuel et une vision commune des plus graves violations des droits de la personne par les États parties

1. Le droit de regard mutuel et ses conséquences juridiques

Ce droit de regard mutuel sur des violations les plus graves aux droits de la personne que sont le génocide, les crimes de guerre et contre l'humanité : quatre-vingt-douze (92) États ont décidé de se le conférer en établissant la CPI. Il convient cependant de souligner les limites de ce droit de regard.

Tout d'abord, la Cour ne s'occupe que des crimes qui surviennent après sa mise en œuvre[16]. Les États peuvent néanmoins reconnaître, par une déclaration, la compétence de la Cour pour des crimes précis commis sur leur territoire ou par leurs ressortissants. Ils disposent aussi de la possibilité de consentir, toujours par une déclaration, à l'exercice de la compétence de la Cour sur une situation passée[17]. Par ailleurs, la compétence *rationae personae* de la Cour est restreinte. La CPI n'a compétence qu'à l'égard des ressortissants de la nationalité d'un pays signataire et à l'encontre des crimes commis sur le territoire d'un pays signataire[18]. Ainsi elle ne prend pas la charge des crimes internationaux commis par des ressortissants des pays et dans les pays qui ne sont pas parties au Traité[19] Enfin, si le Conseil de sécurité peut se prévaloir du chapitre VII de la Charte des Nations unies pour soumettre une situation

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16 *Statut de Rome*, précité, note 4, art. 11(1).

17 *Id.*, art. 12(3) : « Si l'acceptation de la compétence de la Cour par un État qui n'est pas partie au présent Statut est nécessaire aux fins du paragraphe 2, cet État peut par déclaration déposée auprès du greffier, consentir à ce que la Cour exerce sa compétence à l'égard du crime dont il s'agit. L'État ayant accepté la compétence de la Cour coopère avec celle-ci sans retard et sans exception conformément au chapitre IX ».

18 *Id.*, art. 12(2).

19 *Id.*, art. 11(2) : « Si un État devient partie au présent Statut après l'entrée en vigueur de celui-ci, la Cour ne peut exercer sa compétence qu'à l'égard des crimes commis après l'entrée en vigueur du Statut pour cet État, sauf si ledit État fait la déclaration prévue à l'article 12, paragraphe 3 ».

dans laquelle des violations graves du droit humanitaire ont été commises dans n'importe quel État du monde, il peut tout aussi bien suspendre l'activité de la Cour[20].

Ainsi, sous réserve de la saisine de la Cour par le Conseil de Sécurité, la compétence de la CPI sur un inculpé ne peut donc être exercée sans avoir établi préalablement un lien de rattachement entre le prévenu et un État signataire. En bref, le crime doit avoir été commis dans un État signataire par qui que ce soit ou l'auteur doit avoir la nationalité d'un État partie. On ne peut manquer de souligner ici la stratégie agressive des États-Unis depuis l'entrée en vigueur du Statut de Rome de forcer des ententes bilatérales[21], notamment avec des pays parties, pour leur faire promettre de ne pas acheminer vers la CPI des ressortissants américains se trouvant sur leur territoire. À ce jour, une cinquantaine de pays de par le monde auraient conclu un accord d'immunité en faveur des citoyens américains pouvant se trouver sur leur sol en vertu d'une loi dite de *protection des personnels militaires*[22]. Les États-Unis auraient entrepris cent quatre vingt (180) démarches de ce genre. Il va sans dire que les pressions exercées sur les pays pour les faire signer ces accords « d'impunité », aux dires de plusieurs, sont importantes et s'expriment en termes économiques, militaires et politiques. Trente cinq (35) États dont

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[20] *Id.*, art. 16.

[21] Les accords bilatéraux d'impunité sont libellés comme suit :

> « 2. Les ressortissants d'une Partie au Traité présents sur le territoire de l'autre État partie, ne doivent pas, en l'absence du consentement exprès de la première Partie : a) être transférés à la CPI; b) être transférés à une autre entité ou à un pays tiers, dans le but d'être transférés devant la CPI. 3. Lorsque les États-Unis extradent, remettent ou transfèrent une personne ressortissant de l'autre Partie à l'accord vers un pays tiers, les États-Unis s'engagent à ne pas accepter la remise ou le transfert de cette personne à la Cour pénale internationale par le pays tiers, sauf en cas de consentement exprès du Gouvernement de X. 4. Lorsque le Gouvernement de X extrade, remet ou transfère un personne ressortissant des États-Unis d'Amérique vers un pays tiers, le Gouvernement de X s'engage à ne pas accepter la remise ou le transfert de cette personne à la Cour pénale internationale par un pays tiers, sauf en cas de consentement exprès du Gouvernement des États-Unis. Ces accords bilatéraux contiennent une clause additionnelle lorsque le pays n'est pas partie au Statut de Rome et c'est la suivante : Chaque Partie accepte, sous réserve de ses obligations juridiques internationales, de ne pas délibérément faciliter, consentir à ou coopérer aux efforts de toute Partie ou tout État tiers d'extrader, remettre ou transférer une personne ressortissant de l'autre Partie à l'accord à la Cour pénale internationale. »

[22] HR4775, « American Service Members' Protection Act » (ASPA).

dix (10) pays de l'Afrique et quatorze(14) de l'Amérique centrale et du Sud voient leur aide militaire et économique réduite ou suspendue parce qu'ils n'ont pas signé d'accord d'immunité. Il en est également ainsi pour neuf (9) pays européens de l'Est et deux (2) pays de la région Asie-Pacifique[23]. Tout récemment, le Conseil de l'Europe s'est indigné de ces pressions américaines sur les pays européens de l'Est et les a priés de résister à ce chantage éhonté en dépit des sanctions économiques américaines à leur égard [24].

Les parties au Traité de Rome ont, faut-il le rappeler, promis de coopérer avec la CPI dans les enquêtes et faciliter la mise en accusation des criminels internationaux[25]. Lorsqu'ils signent un accord d'immunité avec les États-Unis, ils se trouvent donc placés dans une situation de conflits d'obligations internationales[26]. Les États-Unis sont si convaincus du caractère politique des poursuites éventuelles devant la CPI et du caractère hostile du monde entier à leur endroit qu'ils disent ne pas vouloir exposer leurs nationaux à de fausses accusations et, le cas échéant, qu'ils veulent être les seuls juges des crimes internationaux commis par leurs ressortissants. La CPI est tout de même un tribunal légitime né de la volonté politique d'un très grand nombre d'États souverains qui affirment au surplus la préséance de la compétence des tribunaux nationaux sur les poursuites criminelles relatives aux plus graves violations des droits de la personne. Cette limpidité juridique n'a pas l'heur de rassurer les États-Unis. Bien entendu, un peu de réalisme politique doit nous persuader que l'établissement de la CPI dans l'ordre juridique mondial cause beaucoup

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[23] Communiqué de la FIDH, CPI : « Les États-Unis passent à l'acte » : http://www.fidh.org (dernière visite : le 13 février 2004).

[24] Corine LESNES, « Les États-Unis durcissent leur campagne contre la CPI », *Le Monde*, 3 juillet 2003 et Assemblée parlementaire du Conseil de l'Europe, Résolution 1300 (2002), *Risques pour l'intégrité du Statut de la Cour pénale internationale*, point 10.

[25] *Cf.* chapitre IX du Statut de la Cour pénale internationale, « Coopération internationale et assistance judiciaire ». L'article 86 dispose : « Conformément aux dispositions du présent statut, les États parties coopèrent pleinement avec la Cour dans les enquêtes et poursuites qu'elle mène pour les crimes relevant de sa compétence ».

[26] L'Assemblée parlementaire du Conseil de l'Europe considère que ces « accord d'immunités ne sont pas acceptables en vertu du droit international régissant les traités ». Assemblée parlementaire du Conseil de l'Europe, Résolution 1300 (2002), point 10, précitée, note 24.

de tensions et de tumultes dans les relations diplomatiques internationales. Vu sous l'angle politique, le phénomène des accords bilatéraux autour de la CPI et l'agressivité américaine au sujet du Traité de Rome peuvent être envisagés comme une partie de bras de fer entre le pouvoir style « Far West » et la loi du plus fort à l'américaine d'une part et une oligarchie d'États plus faibles se ralliant aux « bien pensants » de l'Occident d'autre part.

2. La vision commune au sujet des crimes et les nouvelles règles de droit international pénal

L'on peut faire une autre observation au sujet de la compétence matérielle de la Cour pénale internationale. Le Statut de la CPI prend ses distances avec le droit coutumier international en choisissant de circonscrire les crimes dans une définition précise ayant la plupart des caractéristiques attendues d'un texte de loi[27]. Cette façon de faire est tout à fait louable car elle contribue à mettre fin aux critiques relevant les accrocs au principe de légalité qui collent à la peau du droit international pénal depuis Nuremberg. En effet, pour les pénalistes, laisser la configuration des infractions internationales les plus graves dans le mystère du nébuleux droit coutumier international reste tout à fait critiquable. Affirmer de plus que le droit conventionnel des Traités, élaboré par et pour des États souverains, aurait également créé des crimes imputables à des individus en les rendant punissables de peines non déterminées par ces mêmes Traités et qui sont disparates en raison de la variété répressive des droits pénaux nationaux, cela heurte toujours toutes nos cordes sensibles de juristes de droit pénal[28]. Les États parties au Traité de Rome ont donc fait des efforts en conférant à leurs textes d'infractions et de peines plus de prévisibilité et de précision pour leurs destinataires et le principe de légalité des délits et des peines se présente sous de meilleurs auspices avec le Statut de la CPI.

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[27] Il est à noter que le droit international coutumier reste source d'interprétation des infractions et que certaines imprécisions de rédaction peuvent faire l'objet de critiques. Voir Hélène DUMONT, « Quand l'international fait une alliance avec le pénal, assiste-t-on à la naissance d'un droit pénal international génétiquement modifiée? », (2003) 33 *R.D.G.* 133, 135-137.

[28] Marc HENZELIN, « Droit international pénal et droits pénaux étatiques. Le choc des cultures », dans Marc HENZELIN et Robert ROTH, *Le droit à l'épreuve de l'internationalisation*, Paris, L.G.D.J., 2002, p. 70.

Bien entendu, dans la mesure où les tribunaux nationaux et des tribunaux internationaux *ad hoc* continueront de liquider les atrocités du passé avec le droit international pénal réputé existé au moment où elles ont été commises, les règles d'attribution de la responsabilité pénale internationale n'ont pas fini de se créer dans le flou total. Celles-ci risquent d'être à géométrie variable selon les tribunaux qui les découvriront, nous révéleront à quoi elles ressemblaient au moment des massacres, puis les appliqueront *ex post facto* à quelques responsables pour leur donner une valeur d'éternité. À cet égard, le droit international pénal qui s'élaborera à la CPI est tout à fait bienvenu parce qu'il commence d'un bien meilleur pied au plan juridique.

Les nouvelles règles de droit pénal international résultant du Statut de Rome n'ont pas été conçues, il est vrai, par un législateur mondial qui n'existe pas; mais celles-ci ont été acceptées et voulues communes à quatre-vingt-douze (92) États souverains partenaires du Statut de Rome et elles peuvent devenir le droit éventuellement applicable à tous les États qui y adhéreront par la suite. Leur légitimité est, à notre avis, fort respectable; peut-on vraiment trouver répréhensible que, pour le futur, des États transfèrent à un forum supranational leur compétence territoriale réciproque sur des crimes précis et rendent leurs citoyens redevables devant la CPI selon des règles de droit substantif et de droit procédural qu'ils ont élaborées ensemble? Il est enfin difficile de reprocher à ce tribunal le défaut du TMI de Nuremberg d'être un « tribunal des vainqueurs » puisqu'il s'applique aux pays qui consentent à sa mise en oeuvre. En tout état de cause, si le droit de Nuremberg a été conçu dans l'illégalité, aujourd'hui, la communauté internationale ne remet plus en question la justice de son résultat et accepte volontiers la légitimité de la création de ses crimes contre l'humanité, une catégorie de crimes qu'a bel et bien adoptée et nommée le Statut de Rome.

De plus, les pays parties ont tous promis d'harmoniser leur droit pénal local à ces nouvelles règles de droit international pénal. C'est ce que le Canada a fait d'ailleurs en adoptant sa *Loi sur les crimes de guerre et contre l'humanité*[29]. Même une harmonisation législative et constitutionnelle tardive de la part des États parties au Statut de Rome, qui n'ont pas toutes les mêmes difficultés d'intégration des règles internationales dans leur droit interne, ne prive pas leurs juges nationaux

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[29] *Loi sur les crimes de guerre et les crimes contre l'humanité*, L.C., 2000, c. 19.

d'interpréter leur droit pénal local de façon évolutive et compatible avec le nouveau droit du Traité de Rome que leur État a par ailleurs ratifié[30].

On a souvent manifesté de la méfiance à l'égard du fonctionnement de la CPI et du futur travail d'interprétation des règles de droit international par les juges de la CPI. Souvent les critiques ont été véhémentes de la part des *common lawyers* qui ne peuvent concevoir qu'un système judiciaire soit crédible au plan de la justice s'il est différent du leur au plan procédural. Pourtant les injustices de l'apartheid en Afrique du Sud n'ont sûrement pas eu le rempart de la *common law* et de la procédure adversaire pour être réparées ou dénoncées. D'ordinaire, les injustices ne connaissent pas d'obstacles juridiques quand il n'y a aucune volonté politique de sévir ou de réparer. Si la communauté humaine a une excellente connaissance fondée sur l'intuition, l'histoire et l'expérience des atrocités et injustices laissées impunies, qui peut prétendre savoir comment on peut y mettre fin avec le droit pénal, qui peut affirmer que son système juridique soit d'emblée le meilleur pour mettre fin à l'impunité plutôt que celui que l'on a élaboré à plusieurs dans l'espoir d'y arriver?

Les juges de la CPI, quant à eux, recèlent dans leurs origines toute la diversité des cultures et des traditions juridiques. L'interprétation des nouvelles règles par la CPI sera issue de l'expression de cette diversité et il ne faut pas oublier la loyauté des juges internationaux à leur serment qui les oblige à servir le bien commun et toute la communauté internationale[31]. Ce sont là, en tout réalisme, de fort bonnes qualités

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[30] Dans les pays monistes, la ratification d'un traité suppose la réception immédiate du droit international dans le droit interne tandis que les pays dualistes comme le Canada doivent faire une démarche législative d'intégrer le droit international dans le droit interne pour qu'il fasse partie du droit interne. Il faut toutefois observer que même les pays monistes se comportent comme des pays dualistes en matière pénale et ils refusent souvent d'appliquer le droit international dans des affaires criminelles s'il n'y pas eu de déclaration législative interne. Voir à ce sujet l'excellent article de M. HENZELIN, *loc. cit*., note 28. Voir aussi : La Cour pénale internationale, *Manuel de ratification et de mise en œuvre du Statut de Rome*, 2e éd., mars 2003, Projet conjoint du Centre de Droit et Démocratie et du Centre international pour la réforme du droit criminel et la politique en matière de justice pénale.

[31] On notera toutefois que les règles présidant à la présentation des candidats demeurent du ressort de chaque État. La Commission nationale consultative des droits de l'homme française s'est ainsi à plusieurs reprises inquiétée de l'absence de règles claires à cet égard. *Cf.* notamment, CNCDH, *Avis sur la mise en oeuvre du Statut de*

professionnelles et conditions situationnelles d'impartialité pour construire le droit international pénal. Constatant que les juges de la CPI ont une qualité d'indépendance à l'échelle internationale que plusieurs n'auraient pas à l'échelle locale sur la matière spéciale à juger, ces juges présentent l'espoir d'une bien meilleure mouture pour le droit international pénal que le *smorgasbord* issu de cinquante ans de pratique sporadique devant quelques tribunaux nationaux et juridictions internationales *ad hoc*.

Les signataires du Statut de Rome se donnent également sept (7) ans pour s'entendre sur une définition du crime d'agression qui soit acceptable à la majorité des deux tiers des États parties et pour fixer les conditions d'exercice de la compétence de la Cour sur celui-ci[32]. N'oublions pas que la guerre d'agression, un crime contre la paix, constituait l'infraction centrale du procès Nuremberg. Le Statut proclame l'existence juridique de ce crime contre la paix. Même s'il n'est pas défini à l'heure actuelle, certains essaient avec force de mots et artifices de rhétorique d'oublier ce crime emblématique de Nuremberg tellement il recèle un potentiel juridique de rendre injustifiables toutes les guerres. Comment comprendre autrement l'acharnement des États-Unis à qualifier leur guerre à l'Irak à partir d'une nouvelle notion juridique de « guerre préventive » aux fins de la rendre légalement juste; seraient-ils hantés par le spectre de se voir accuser un jour du crime majeur du procès Nuremberg? Comment comprendre la décision de garder à Guantanamo et hors de leur territoire démocratique des Talibans afghans et celle de refuser de les considérer comme des prisonniers de guerre (POW)? Ces prisonniers sont plutôt affublés de l'étiquette de criminels terroristes par l'État de droit américain mais ils n'ont pas de procès, pas de forum civil pour les juger et pas de

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la Cour pénale internationale, adopté le 19 décembre 2002. http://www.commission-droits-homme.fr/ (dernière visite : le 10 février 2004).

32 *Statut de Rome*, précité, note 4, art. 5(2) : « La Cour exercera sa compétence à l'égard du crime d'agression quand une disposition aura été adoptée conformément aux articles 121 et 123, qui définira ce crime et fixera les conditions de l'exercice de la compétence de la Cour à son égard. Cette disposition devra être compatible avec les dispositions pertinentes de la Charte des Nations-Unies ». Il faut noter que le crime d'agression constituait le crime central des infractions reprochées aux accusés du procès Nuremberg. Le crime était libellé ainsi : art. 6(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

présomption d'innocence[33]. Et quand ces Talibans ont quelques liens avec le monde extérieur, ce serait avec des espions!

Décidément, le vocabulaire de la guerre et celui du droit pénal sont entremêlés et interchangeables à souhait; on fait la lutte au crime de terrorisme avec des guerres à l'axe du mal ou l'on crée le droit humanitaire et pénal qui convient pour faire la guerre qu'on veut. Robert Charvin dans un article intitulé : *Éthique, Cité et Mondialisation*[34] dit : « Plus que jamais les mots sont délibérément utilisés sans rigueur par ceux qui ont les moyens de les imposer à la société » et il cite A. de Tocqueville qui soulignait déjà à son époque : « Ce qui jette le plus de confusion dans l'esprit, c'est l'emploi qu'on fait des mots… Tant qu'on n'arrivera pas à les définir clairement et à s'entendre sur la définition, on vivra dans une confusion inextricable, au grand avantage des démagogues et des despotes ».

Qui possède l'objectivité suffisante et l'autorité légitime pour définir un crime contre la paix pour la communauté internationale et qui offrirait pour le XXI^{e} siècle toute la puissance symbolique du procès Nuremberg après la deuxième guerre mondiale qui a tout de même fait naître le droit pénal international? Quatre vingt douze États ont, en tout cas, fait un pas dans la bonne direction en ratifiant le Traité de Rome qui reconnaît l'existence du crime d'agression et qui promet de le définir pour s'en prendre bientôt aux criminels qui menacent toujours impunément la paix et la sécurité mondiale par leurs guerres d'agression.

Enfin, le Statut énonce une règle que l'on assimile à un grand pas dans la lutte contre l'impunité : en effet, les chefs d'État et autres autorités politiques des pays partenaires au Traité qui commettent des atrocités ne pourront plus invoquer l'immunité de fonction ou leur qualité officielle pour échapper aux poursuites de génocide, de crimes de guerre ou contre l'humanité devant la CPI[35]. Ainsi, il est désormais possible, au moins sur le plan formel, qu'un chef d'État d'un pays signataire responsable de

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[33] Olivier AUDEOUD, « Prisonniers sans droits de Guantanamo », *Le Monde Diplomatique*, avril 2002, 16.

[34] Robert CHARVIN, « Éthique, Cité et Mondialisation », dans CRMC, *Éthique et Politique*, Marrakech, 27-28.01.200, p. 2. Il cite à la p. 8, Marx qui ironisait : « Nul ne combat la liberté, on combat tout au plus celle des autres ». Charvin ironise à son tour : « Nul ne combat la morale, on combat tout au plus celle des autres ».

[35] *Statut de Rome*, précité, note 4, art. 27.

massacres soit remis à la CPI par son propre État[36]. Enfin, comme les États signataires ont promis de coopérer avec la CPI, celle-ci peut réclamer un chef en fonction ou déchu et l'État partie qui le détient ou le reçoit, doit procéder à sa remise. On soulignera ici, que si la demande de la Cour concerne un dirigeant d'un État partie, cela ne soulève pas trop de problème[37]. La situation est en revanche complètement différente si cette demande concerne un dirigeant d'un État non-partie, mais qui aurait commis ou serait responsable de crimes sur le territoire d'un État partie. L'État doit-il se conformer à ses obligations internationales ou bilatérales en matière d'immunités ou se conformer à la demande de la Cour[38]? L'objet de cette présentation n'est pas de rentrer dans le détail de cette question fort complexe mais il convient toutefois de mettre en lumière qu'elle n'est pas encore tranchée et qu'elle ne manquera pas de soulever d'importants débats[39].

Rappelons pour mémoire que l'immunité des chefs d'État est étroitement liée à la notion de souveraineté étatique et qu'elle est justifiée par la nécessité de la fonction[40]. De plus, entre égaux, les États souverains ne se jugent pas mutuellement et réciproquement. À chacun sa

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[36] *Id.*, art. 58 et 59. Rappelons toutefois que la Cour n'est que complémentaire des juridictions nationales. Elle ne pourra exercer sa compétence qu'après avoir conclu à l'incapacité ou à l'absence de volonté de l'État. Ces critères ne sont pas encore définis.

[37] Micaela FRULLI, « Le droit international et les obstacles à la mise en œuvre de la responsabilité pénale pour crimes internationaux », dans A. CASSESE et M. DELMAS-MARTY (dir.), *op. cit*., note 9, p. 215.

[38] C'est ici que se pose toute la question de la validité des accords bilatéraux conclus par les États-Unis en vertu des dispositions de l'article 98 du statut.

[39] *Cf.* Stephen WIRTH, « Immunities, related problems, and article 98 of the *Rome Statute* », (2001) 12 *Criminal Law Forum* 429; Gennady M. DANILENKO, « ICC Statute and Third States », p. 1871-1897, dans CASSESE, GAETA et JONES, *The Rome Statute of the International Criminal Court*, vol. 2, Oxford University Press, 2002; Paola GAETA, « Official Capacity and Immunities » dans CASSESE, GAETA et JONES, « The Rome Statute of the International Criminal Court: A commentary », vol. 1, Oxford University Press, 2003, p. 975.

[40] « State immunity serves two purposes. The first is the protection of the ability of a state to carry out its functions without external interference. The second—less important—purpose of state immunity is to protect a state's dignity, which may suffer if the sovereign state has to comply with another state's order. It is evident that the more important object of protection, the ability of a state to function, is especially endangered in the case of *mala fide* procedures. » S. WIRTH, *id*., 431.

souveraineté, pourrait-on dire. L'histoire fournit cependant de nombreux exemples pour affirmer que cette immunité nécessaire a été synonyme d'impunité pour des atrocités sans nom. L'idée de la levée de l'immunité des chefs d'État responsables de crimes internationaux s'est construite juridiquement de deux façons au cours du XX^{e} siècle : d'abord dans les instruments internationaux, le Traité de Versailles après la Première guerre mondiale, la Convention pour la prévention et la répression du crime de génocide, puis dans les statuts des tribunaux internationaux, la Charte du tribunal de Nuremberg et celui de Tokyo, les statuts du TPIY (Yougoslavie) et du TPIR (Rwanda). Le TPIY a ainsi estimé que « les individus sont personnellement responsables, quelles que soient leurs fonctions officielles, fussent-ils chefs d'État ou ministres »[41]. L'article 27 confirme dorénavant la règle qu'un chef d'État ne peut se soustraire à sa responsabilité en alléguant qu'il a agi au nom d'un État. En commettant des crimes visés par le Statut, il outrepasse les pouvoirs que lui reconnaît le droit international : sa souveraineté est criminelle aux yeux du droit international. L'on pourrait même avancer la thèse que le génocide, les crimes de guerre et contre l'humanité constitueraient aussi des actes de trahison à l'échelle du droit national[42].

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[41] *Le procureur* c. *Anto Furundzija*, jugement du 10 décembre 1998, par.140 :

> « Les règles du droit international conventionnel et coutumier évoquées plus haut font peser des obligations sur les États et d'autres entités dans les conflits armés, mais elles visent au premier chef les actes des individus, notamment les agents de l'État ou, plus généralement, les responsables officiels d'une Partie au conflit ou encore les individus agissant à l'instigation ou avec le consentement exprès ou tacite d'une Partie au conflit. Tant les règles du droit coutumier que les dispositions des traités applicables en période de conflit armé interdisent tout acte de torture et précisent que ceux qui s'y livrent en sont comptables personnellement devant les juridictions pénales. Comme le Tribunal militaire international de Nuremberg l'a fait observer en termes généraux, « [L]es infractions en droit international sont commises par des hommes et non par des entités abstraites. Ce n'est qu'en punissant les auteurs de ces infractions que l'on peut donner effet aux dispositions du droit international ». Les individus sont personnellement responsables, quelles que soient leurs fonctions officielles, fussent-ils chefs d'État ou ministres. L'article 7(2) du Statut et l'article 6(2) du Statut du Tribunal pénal international pour le Rwanda (« TPIR ») sont indiscutablement du droit international coutumier ».

[42] Cette thèse pourrait être développée pour mettre fin à l'immunité du chef d'État en fonction devant les tribunaux nationaux de son propre pays. Michel Cosnard estime qu'« [o]n pourrait toujours avancer que le flou des incriminations contenues dans certaines constitutions – prévoyant les cas de haute trahison – pourraient être interprétées comme incluant les crimes graves de droit international ». Il précise toutefois que « seul l'article 26 de la Loi fondamentale de la R.F.A., prévoyant la

L'article 27 du Traité constitue un des points d'achoppement les plus important entre les États parties et les États non-parties. Selon Gennady M. Danilenko[43], la possibilité que les États puissent, en vertu du Statut de Rome, lever les immunités personnelles accordées au chef d'État est l'une des principales préoccupations des États non-parties. Un commentateur mentionnait devant le Sénat américain : « Our main concern from the US perspective is not that the prosecutor will indict the occasional US soldier who violates our own values and laws and his or her military training and doctrine by allegedly committing a war crime. Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defence and foreign policy »[44].

En résumé, au strict plan de sa compétence sur les personnes ayant commis les crimes internationaux les plus graves, l'établissement de CPI prévoit un mécanisme réel mais limité de mettre fin à l'impunité dans l'ordre juridique international.

II. DEUXIÈME PARADOXE : PRÉSÉANCE DE LA JUSTICE NATIONALE SUR LA JUSTICE INTERNATIONALE ET SI C'ÉTAIT LE CONTRAIRE?

La petite histoire raconte que l'on n'aurait pas réussi à avoir le nombre suffisant de signatures si le Traité de Rome confiait une compétence première à la CPI comme on l'a fait pour les tribunaux *ad hoc* (TPIY) (TPIR)[45]. Les États parties au Traité de Rome ont par conséquent convenu que la compétence de la CPI serait complémentaire à la leur[46].

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responsabilité pénale pour des actes susceptibles de troubler la coexistence pacifique, peut se prêter à une telle interprétation ». Michel COSNARD, « Les immunités du chef d'État », S.F.D.I. « Colloque de Clermont-Ferrand – Le Chef d'État et le droit international », Pedone, 2002, p. 202-203.

43 *Loc. cit.*, note 39, aux pages 1884 et 1885.

44 Voir Hearing on the Creation of an International Criminal Court before the Subcommittee on International Operations of the Committee on Foreign Relations, US Senate, 105th Congress, at 30 (statement of J. Bolton), cité par G.M. DANILENKO, *loc. cit.*, note 39.

45 Philippe KIRSCH, « Les enjeux et les défis de la mise en œuvre de la Cour pénale internationale permanente », dans Les Journées Maximilien-Caron 2003, *La voie vers la Cour pénale internationale : tous les chemins mènent à Rome*, Montréal, Éditions Thémis, 2004.

46 *Statut de Rome*, précité, note 4, art. 1 : « Il est créé une Cour pénale internationale en tant qu'institution permanente, qui peut exercer sa compétence à l'égard des

A. La complémentarité : la CPI peut-être première plus souvent qu'on ne le pense

En fait, la Cour offre une alternative à l'exercice de la juridiction nationale et entre en opération seulement si un État partie n'a ni la volonté, ni la capacité de mener des poursuites à terme[47] ou dénature l'exercice de sa compétence nationale en la matière en octroyant aux génocidaires et autres criminels du genre, de façon factice, partiale ou sans examen, des acquittements, peines injustifiées, classements sans suite ou amnisties en autant que ces situations ne mettent en cause la règle *non bis ibidem*. La Cour prend aussi la relève si le système pénal du pays compétent est effondré au point de ne pouvoir mener à bien les procédures[48].

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personnes pour les crimes les plus graves ayant une portée internationale, au sens du présent Statut. Elle est complémentaire des juridictions pénales nationales.[…] ».

47 *Id.*, art. 17(1) : « Eu égard au dixième alinéa du préambule et à l'article premier, une affaire est jugée irrecevable par la Cour lorsque : a) L'affaire fait l'objet d'une enquête ou de poursuites de la part d'un État ayant la compétence en l'espèce, à moins que cette décision ne soit l'effet du manque de volonté ou de l'incapacité de l'État de mener à bien l'enquête ou les poursuites; b) L'affaire a fait l'objet d'une enquête de la part d'un État ayant compétence en l'espèce et que cet État a décidé de ne pas poursuivre la personne concernée, à moins que cette décision ne soit l'effet du manque de volonté ou de l'incapacité de l'État de mener véritablement à bien des poursuites; c) La personne concernée a déjà été jugée pour le comportement faisant l'objet d'une plainte, et qu'elle ne peut être jugée par la Cour en vertu de l'article 20, paragraphe 3 (non *bis ibidem*); d) L'affaire n'est pas suffisamment grave pour que la Cour y donne suite ».

48 *Id*., art. 17(2) : Pour déterminer s'il y a manque de volonté de l'État dans un cas d'espèce, la Cour considère l'existence, eu égard aux garanties d'un procès équitable reconnues par le droit international, de l'une ou plusieurs des circonstances suivantes : a) La procédure a été engagée ou est engagée ou la décision de l'État a été prise dans le dessein de soustraire la personne concernée à sa responsabilité pénale pour les crimes relevant de la compétence de la Cour visée à l'article 5; b) La procédure a subi un retard injustifié qui, dans les circonstances, est incompatible avec l'intention de traduire en justice la personne concernée; c) La procédure n'a pas été ou n'est pas menée de manière indépendante ou impartiale mais d'une manière qui, dans les circonstances, est incompatible avec l'intention de traduire en justice la personne concernée. 3) Pour déterminer s'il y a incapacité de l'État dans un cas d'espèce, la Cour considère si l'État est incapable, en raison de l'effondrement de la totalité ou d'une partie substantielle de son propre appareil judiciaire ou de l'indisponibilité de celui-ci, de se saisir de l'accusé, de réunir les éléments de preuve et les témoignages nécessaires ou de mener autrement à bien la procédure.

> « Pour qu'un État soit dans l'incapacité de mener véritablement à bien l'enquête ou les poursuites, il est nécessaire de démontrer « l'effondrement de la totalité ou d'une partie substantielle de son propre appareil judiciaire ». On distingue trois situations où il sera estimé qu'un État n'a pas la volonté de mener à bien les poursuites : lorsque la procédure a été engagée dans le dessein de soustraire la personne concernée à sa responsabilité pénale; lorsque la poursuite a subi un retard injustifié; ou lorsque la procédure n'a pas été ou n'est pas menée de manière indépendante et impartiale ».[49]

1. Bilan au sujet de l'exercice de la compétence des tribunaux nationaux sur les crimes internationaux

Mais la CPI sera-t-elle en chômage puisque les cours nationales ont préséance sur elle pour juger le génocide, les crimes de guerre et contre l'humanité? Avec la CPI, a-t-on un nouveau gendarme pour la planète ou un héros d'opérette? Examinons la compétence des tribunaux nationaux en la matière et l'exercice qu'ils en ont fait jusqu'à maintenant.

Rien n'empêche un État, qu'il soit signataire ou non du Traité de Rome, de poursuivre devant ses propres tribunaux un criminel qui a commis un génocide, des crimes de guerre ou contre l'humanité en agissant, selon le cas, en vertu de la territorialité du crime (compétence territoriale), de la nationalité de l'auteur ou de la victime (compétence personnelle active ou passive). Par exemple, le juge espagnol Garzon a institué plusieurs poursuites contre des Chiliens et des Argentins pour des crimes contre l'humanité et pour des génocides qui avaient pour victimes des Espagnols[50]. La Belgique a ouvert plusieurs dossiers d'instruction concernant le massacre de plusieurs ressortissants belges lors du génocide rwandais[51] et la Cour d'Assises de Bruxelles a d'ailleurs condamné quatre Rwandais pour de tels crimes[52].

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[49] K.I. LEE, *loc. cit*., note 9, à la page 467.

[50] Richard J. WILSON, « Prosecuting Pinochet: International Crimes in Spanish Domestic Law », (1999) 21 *Hum.Rts.Q.* 946.

[51] Damien VANDERMEERSCH, « Compétence universelle et immunités en droit international humanitaire – la situation belge », dans M. HENZELIN et R. ROTH, *op. cit.*, note 28.

[52] *Ministère public* c. *Ntezimana*, Cour d'Assises, Bruxelles, juin 2001.

Bien avant l'établissement de la CPI, des États, signataires ou non signataires du Traité de Rome, ont aussi assujetti devant leurs tribunaux des criminels accusés de crimes de guerre et contre l'humanité les plus graves à un quelconque endroit dans le monde en se fondant sur la prétendue compétence universelle de leurs cours nationales[53] et en l'exerçant sur des crimes commis à l'étranger, par des étrangers, sur des étrangers. Comme le suggèrent S. Williams et J. Castel[54], il serait de l'essence d'un crime de droit international de relever de la compétence de tous les États. Sur ce point précis, le droit international nous offre le dilemme de la poule et de l'œuf : lequel vient en premier? La compétence universelle des tribunaux nationaux ou le crime international. Quoiqu'il en soit, Israël a poursuivi *Eichmann*[55], les États-Unis ont entendu la cause *Demjanjuk*[56], l'Australie celle de *Polyukhovich*[57] et les tribunaux canadiens se sont considérés compétents dans l'affaire *Finta*[58], la Grande Bretagne a fait état de la compétence universelle de ses tribunaux dans

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[53] André HUET et Renée KOERING-JOULIN, *Droit pénal international*, PUF, 1993, p. 190 et 191 : « La juridiction universelle est un système donnant vocation aux tribunaux de tout État sur le territoire duquel se trouve l'auteur d'une infraction pour connaître de cette dernière et ce, quels que soient le lieu de perpétration de l'infraction et la nationalité de l'auteur ou de la victime. »

[54] Sharon A. WILLIAMS et J.G. CASTEL, *Canadian criminal Law: International and Transnational aspects*, Toronto, Butterworths, 1981, p. 137 et suiv.

[55] *Attorney General of the Government of Israel* c. *Eichmann*, 36 ILR 1962 (Cour suprême d'Israël), 300 : « Not only do all crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed. »

[56] *Demjanjuk* c. *Petrovsky*, 776 F.2d 571 (US Court of Appeal, 6th cir.), 31 octobre 1985, A.J.I.L., vol. 80, 1986, 571: « Some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law. »

[57] *Polyukhovich* c. *The Commonwealth of Australia and another*, (1991) 172 C.L.R. 501 (FCA 91/26), par. 659 : « Universal jurisdiction permits jurisdiction to be exercised over a limited category of offences on the basis that the offender is in the custody of the prosecuting state. The jurisdiction is based on the notion that certain acts are so universally condemned that regardless of the situs of the offence and the nationality of the offender or the victim, each state has jurisdiction to deal with perpetrators of those acts ».

[58] *R.* c. *Finta*, [1994] R.C.S. 701.

l'affaire *Pinochet*[59]. Le droit international reconnaît la compétence universelle des tribunaux nationaux en matière de génocide, de crimes de guerre, et de crimes contre l'humanité les plus graves et explique qu'elle serait tantôt le résultat de la coutume internationale (*jus cogens*), tantôt affirmée dans des conventions auxquelles tout le monde adhère, et souvent reconnue par voie législative par un très grand nombre d'États souverains[60] . Le Canada a d'ailleurs reconnu dans sa *Loi sur les crimes de guerre et contre l'humanité* qu'il avait en cette matière une compétence territoriale, une compétence personnelle active et passive et qu'il se reconnaissait aussi une compétence universelle sur le génocide, les crimes de guerre et contre l'humanité[61]. La seule condition généralement admise pour l'exercice de cette compétence universelle des tribunaux canadiens serait la présence du criminel sur le territoire pour tenir le procès [62], mais le Canada pourrait ouvrir une enquête sans que le suspect ne soit sur son territoire[63]. Par contre, quand il s'agit de vérifier si le droit pénal interne d'un État donné fait siennes les règles internationales en matière de compétence universelle pour ses propres tribunaux, la réponse varie selon le pays concerné; elle dépend à la fois de sa méthode d'intégration du droit international et des réserves faites à son endroit dans le droit interne et elle varie en fonction de la plus ou moins grande réceptivité de la coutume et des traités dans les schèmes juridiques de références des juges locaux.

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[59] *R.* c. *Evans and Another and the Commissionner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 mars 1999, 38 ILM 581 (1999).

[60] Éric DAVID, « Une règle à valeur de symbole » dans *La Belgique, justicier de ce monde?*, p. 12. À la page 13, l'auteur cite une étude d'Amnistie Internationale dans laquelle on affirme que 125 États ont légiféré et se reconnaissent une compétence universelle.

[61] L.C., 2000, c. 24, art. 6-8.

[62] La compétence universelle dont s'est dotée la Belgique a fait couler beaucoup d'encre parce qu'elle n'exigeait pas la présence du suspect sur le territoire pour ouvrir une instruction. La loi belge présentait deux autres caractéristiques particulières, celle de pouvoir ouvrir une enquête par la plainte de victimes et celle de pouvoir juger par contumace. C'est ce qui explique l'ouverture d'une instruction contre le Premier ministre d'Israël Sharon pour le massacre de Sabra et Shatila, les plaignants se trouvant des héritiers de victimes civiles. La Belgique a cependant récemment revu sa loi et atténué la portée universelle de sa loi nationale. Voir à cet effet Rachel Crivellaro, « Le Sénat enterre la justice universelle », *La Libre Belgique*, 1er août 2003, sur le site du journal : http://www.lalibre.be/article.phtml?id=10&subid=90&art_id=127314, (dernière visite : le 5 mars 2004).

[63] L.C. 2000, c. 24, art. 9(1).

À première vue, il demeure que compétence des tribunaux nationaux sur les crimes internationaux paraît plus étendue que la compétence de la CPI qui un exige lien de rattachement de l'accusé avec un pays signataire. Les cours étatiques peuvent en effet se saisir de ressortissants de pays qui ne sont pas parties au Statut qui auraient commis des crimes internationaux les plus graves à un quelconque endroit dans le monde avant ou après l'entrée en opération de la CPI[64]. En reconnaissant la priorité des tribunaux nationaux de juger les crimes internationaux qui constituent une atteinte grave à toute l'humanité, le Statut ne modifie pas leur compétence territoriale, personnelle ou universelle en la matière, il ne fait que circonscrire et préciser les conditions d'exercice de sa propre compétence.

Au XX[e] siècle, faut-il le préciser, des millions de civils sont morts par suite de guerres horribles produisant autant de génocides, de crimes de guerre et contre l'humanité que de victimes innocentes et on s'accorde pour dire que presque tous les responsables de ces atrocités ont bénéficié de l'impunité. Les États souverains ne se seraient donc jamais bousculés au portillon pour exercer de façon régulière et continue leur compétence universelle en la matière[65]. Peu d'États s'estiment l'ange gardien de l'ordre juridique international. L'affaire Pinochet est à cet égard exemplaire par le nombre de tribunaux nationaux en mesure de le juger et pourtant, il n'y a pas eu de procès. Un tribunal anglais sur le territoire duquel se trouvait Pinochet pour obtenir des soins médicaux, a estimé que Pinochet pouvait être extradé vers l'Espagne qui le réclamait pour des actes de torture contre des victimes espagnoles mortes au Chili et a décidé qu'il ne pouvait réclamer l'immunité de chef d'État puisqu'il n'était plus en fonction[66]. Pinochet a cependant été renvoyé au Chili par suite de l'avis ministériel anglais qu'il était devenu inapte à subir un procès pour cause

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64 Marc HENZELIN, *Le principe de l'universalité en droit pénal international – Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité*, Facultés de droit de Genève, Bale, Munich, Helbing et Lichtenhahn, Bruxelles, Bruylant, 2000.

65 Comme le rappelle M. PENROSE, « the practice of states—including the United States, Spain, Belgium, Switzerland, France, the United Kingdom and, now, Senegal—suggests that despite the clear language, compliance is rare ». Margaret PENROSE, « It's Good to be the King!: Prosecuting Heads of State and Former Head of State Under international Law », 39 *Colum. J. Transnat'L.* 193, 217.

66 *R.* c. *Evans and Another and the Commissionner of Police for the Metropolis and Others Ex Parte Pinochet*, précité, note 59. Voir aussi pour la chronologie des événements, *The Pinochet case: Timeline*, Tuesday, 25 July, 17:12 CMT 18; 12 UK.

de démence. Pinochet pouvait donc reprendre la route du bercail sans être extradé vers l'Espagne. Les autorités chiliennes ont par la suite examiné la question de poursuivre l'ex dictateur pour des actes de torture contre ses concitoyens devant un forum national, le plus naturel pour le juger[67], mais les procédures n'ont jamais été entamées contre ce tortionnaire devenu sénile prétendument.

Sans traiter de la très grande controverse politique autour de l'affaire Pinochet, disons que celle-ci pouvait donner du fil à retordre à tout juge national saisi du problème. En effet, dans une affaire semblable, il était difficile de reconnaître le droit international et national applicable, compte tenu de l'enchevêtrement des compétences nationales en cause : la compétence universelle du tribunal anglais, la compétence personnelle passive des juridictions espagnoles et la compétence territoriale des tribunaux chiliens et la compétence tous azimuts de la Belgique qui s'est immiscée dans le débat judiciaire à un moment donné. De plus, on avait les difficultés suivantes : des règles d'extradition mêlant le politique et le juridique, l'absence de précédents, le caractère imprécis et obscur du droit international applicable, de très grandes variations étatiques de son intégration en droit interne, un débat sur l'immunité de chef d'État réclamée par un Pinochet à la retraite pour ne pas être soumis à une juridiction étrangère, et beaucoup de Chiliens préférant l'oubli, …bref, ce n'était donc pas simple de juger Pinochet devant le bon tribunal national selon les bons principes et les bonnes règles. C'eût été plus facile, aurait-on pour autant trouver un État prêt à le juger? Enfin, il y a eu si peu de procès semblables dans les annales judiciaires de la dernière moitié du XX^{e} siècle que les systèmes de droit pénal étatique n'ont même jamais eu à élaborer des principes pour résoudre les conflits de loi en cette matière comme le droit international privé le fait depuis fort longtemps.

Par ailleurs, les tribunaux nationaux se sont adonnés encore plus rarement à l'exercice de juger leurs concitoyens responsables de crimes de guerre et contre l'humanité dans des cas où leur compétence territoriale ou personnelle ne faisait pas l'ombre d'un doute. L'on comprend aisément pourquoi : les génocidaires restent au pouvoir, les juges sont complètement inféodés au pouvoir en place, les tribunaux sont dysfonctionnels, la

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[67] Cesare BECCARIA estimait que « le lieu du châtiment ne peut être que le lieu du délit, attendu que c'est là et non ailleurs qu'existe l'obligation de sévir contre un particulier pour défendre le bien public » Voir à cet effet : *Des délits et des peines*, Genève, Droz 1965, Chap. XXIX, p. 55.

justice pénale inexistante ou corrompue, le peuple partage les justifications disculpatoires du pouvoir officiel au sujet des crimes commis ou préfère tout simplement les oublier. Bien des génocidaires et des tortionnaires de ce monde, comme Pinochet, malgré l'avènement de la CPI, seront encore capables de mourir bien au chaud dans leur lit, s'ils proviennent et restent dans un pays non parties au Traité de Rome. La CPI ne peut s'en saisir en droit et le forum autochtone ne peut le faire en fait[68]. Au mieux, les a-t-on peut-être condamnés à ne plus voyager.

La souveraineté et l'égalité des États et le principe corollaire de non ingérence dans les affaires internes d'un autre État[69] sont généralement allégués pour expliquer le non exercice de la compétence universelle des cours nationales et la pénurie de cas d'espèce. Mais d'autres raisons, plus importantes peut-être, expliquent également le non usage de la compétence universelle des tribunaux nationaux. Ces raisons sont les suivantes : 1° le manque d'intérêt d'un État souverain de réprimer les atteintes à un ordre public qui n'est pas le sien[70], 2° la réticence des procureurs d'engager le budget national des poursuites publiques à des poursuites externes fussent-elles internationales et communes à toute l'humanité, 3° l'existence de régimes opportunistes de poursuites criminelles dans la plupart des États souverains qui endossent très rarement l'idée d'une obligation de poursuivre dans leur ordre juridique interne malgré la signature de certains traités à l'effet contraire[71] et 4° le contexte très politisé des crimes internationaux qui risque de perturber les relations diplomatiques du pays qui s'engage à poursuivre des hauts responsables d'un État étranger ayant violé le droit pénal international. Ces considérations risquent de prévaloir encore malgré l'existence d'une Cour pénale internationale d'une part, et en dépit de la confirmation législative

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[68] Le Conseil de sécurité, bien entendu, pourrait faire ce qu'il a fait pour l'ex-Yougoslavie et le Rwanda.

[69] Joe VERHOEVEN, « Vers un ordre répressif universel? Quelques observations », *Annuaire français de droit international*, XLV-1999-CRNS Éditions, Paris, p. 65 : « On dit classiquement que la souveraineté répugne à toute punition ».

[70] *Ibid.*, p. 67.

[71] *Conventions de Genève* du 12 août 1949 et leur *Premier protocole additionnel*, art. 49/I, 50/II, 146/IV, Protocole I, art. 85; *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, Doc. ONU A/Rés./ 39/46, art. 5, par. 2.

de la compétence universelle des tribunaux internes de plusieurs États souverains d'autre part[72].

À d'autres égards, il existe peut-être une certaine sagesse, d'autres diront de la flagornerie, de la part d'un État souverain qui ne ferait rien devant ses tribunaux internes pour s'en prendre aux génocidaires de la planète. Peut-t-on par exemple reprocher au Canada de préférer s'associer à l'indignation de sa société civile au sujet des injustices innommables laissées impunies dans le monde d'aujourd'hui mais de ne rien faire au plan judiciaire? Des décisions du Canada de poursuivre dans quelques affaires particulières risquent-elles d'enterrer des scandales de l'impunité avec un non-lieu judiciaire officiel résultant de l'impossibilité réelle de recueillir la preuve des accusations devant ses instances locales[73]?

Voilà donc un ensemble de raisons constituant de véritables empêchements au fonctionnement des cours nationales en matière de crimes internationaux les plus graves qui ont néanmoins une compétence universelle reconnue pour les prendre en charge. Hélas, toutes ces explications montrent également une absence de solidarité mondiale entre les États souverains et un manque d'entraide mutuelle pour s'en prendre efficacement à des crimes qui portent pourtant atteinte à toute la communauté internationale. Sans contredit, cela illustre aussi la primauté de la poursuite égoïste des intérêts individuels des États souverains au détriment du bien commun de toute l'humanité. Pourtant, dans des sociétés solidaires, prendre en charge les problèmes d'autrui, cela a toujours été considéré dans l'intérêt commun. Par ailleurs, le développement du droit pénal international est, au moins en partie, une leçon du constat que les crimes internationaux, concernent l'ensemble de l'humanité. C'est tout de même troublant que la société mondiale que l'on veut construire parte du principe que la satisfaction des intérêts individuels contradictoires produit inéluctablement le bien commun. Ce principe de l'économie mondiale a de quoi faire tourner dans sa tombe Durkheim, le père de la sociologie moderne, qui a montré que le tout était plus que la somme de ses parties. Même John Nash, le mathématicien mieux connu par le film « A Beautiful Mind » et Prix Nobel d'Économie, a fait une

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[72] Pour le Canada, voir la *Loi sur les crimes de guerre et les crimes contre l'humanité*, précitée, note 29.

[73] « Un délit d'Immodestie? » Entretien avec Benoît de Jemeppe, procureur du Roi de Bruxelles, propos recueillis par Annemie Schaus et Pascale Vielle publié dans *La Belgique, justicier de ce monde?*

démonstration fascinante selon laquelle les principes de coopération produisent, selon des modèles mathématiques appliqués aux groupes, de meilleurs résultats que des principes de compétition.

Convenons enfin si l'on veut mettre fin à l'impunité des principaux responsables de génocide, de crimes de guerre et de crimes contre l'humanité qu'il faut absolument s'en prendre aux têtes dirigeantes des États à l'origine des massacres les plus horribles de l'histoire de l'humanité. Jusqu'à ce jour, ce sont des fora internationaux seulement qui ont réussi à le faire. Que l'on pense d'abord à Nuremberg, ensuite au TPIY qui juge Milosevic en ce moment. Entre ces deux moments de l'histoire où le statut international en cause exclut explicitement la défense d'immunité de fonction, il n'y a pour ainsi dire jamais eu[74] de tribunal national qui a condamné un chef d'État en fonction pour des génocides, crimes de guerre et contre l'humanité. La France n'a pas réussi avec une poursuite contre Khadafi[75] accusé de complicité suite à l'attentat perpétré contre un appareil DC 10 de la Compagnie UTA qui a causé la mort de cent soixante dix personnes au-dessus du Niger. La Cour de Cassation s'est ainsi prononcée : « *Attendu qu'en l'état du droit international, le crime dénoncé, quelle qu'en fut la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'État étranger en exercice* ». Dans un commentaire de l'arrêt, J.-F. Roulot émet l'opinion suivante : S'il y avait matière à répression criminelle, par respect de la souveraineté libyenne qui confère à son chef d'État une immunité de fonction, cette accusation ne pouvait se matérialiser que de deux manières, soit devant un tribunal libyen (une option tout à fait improbable) ou devant une cour internationale (qui n'existait pas)[76]. Une autre affaire mettant en cause la Libye, celle de la Pan Am à Lockerbie, a par ailleurs illustré que la poursuite de certains criminels devant des juridictions nationales, soupçonnées de partialité, se heurtaient à de nombreux obstacles et pouvaient même susciter des différends entre États et donner lieu à

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[74] À notre connaissance, le seul cas où des poursuites par un État ont été à l'encontre des dirigeants en exercice étrangers fut le procès yougoslave à l'encontre des dirigeants des pays de l'OTAN pour les bombardements de 1999 en ex-Yougoslavie. Voir l'article de M. PENROSE, *loc. cit*., note 65, 217.

[75] Arrêt *Kadhafi*, arrêt n° 1414 du 13 mars 2001, Cour de cassation-Chambre criminelle.

[76] Voir pour plus de développement : J.-F. ROULOT, « La coutume du droit international pénal et l'affaire Khadafi », *Recueil Dalloz* 2001, p. 2631.

l'imposition de sanctions par le Conseil de sécurité[77]. La Libye vient tout récemment de se remettre au mieux avec la communauté internationale depuis que la Fondation caritative Kadhafi a fait des dédommagements aux héritiers des victimes de ces deux attentats terroristes sans que par ailleurs le colonel Kadhafi n'admette une quelconque responsabilité[78].

On peut faire état d'autres poursuites nationales désastreuses au chapitre de la fin de l'impunité comme au chapitre des relations diplomatiques. Une autre affaire, celle intentée au Sénégal contre Hissène Habré, ancien dictateur du Tchad déchu depuis 1990, a donné lieu à l'annulation des procédures d'inculpation. Quelques ONG avaient déposé une plainte pénale contre lui avec constitution de partie civile et il fut accusé pour des crimes contre l'humanité, des actes de torture et de barbarie commis dans son pays. Ses avocats ont fait notamment valoir avec succès l'incompétence des pouvoirs judiciaires sénégalais pour le juger, le droit interne ne connaissant pas le principe de l'universalité, et l'absence de fondement à la poursuite étant donné que le droit sénégalais ne connaissait pas la catégorie des crimes contre l'unanimité et que les faits étaient antérieurs à la signature de la Convention sur la torture par le Sénégal[79].

Quoiqu'on dise au sujet de la bonne ou mauvaise interprétation du droit international par des instances nationales, ces décisions que l'on vient d'évoquer, illustrent la difficulté pour des juges nationaux de régler une affaire soumise à leur attention avec d'autres règles que les règles familières de leur droit interne. D'entrée de jeu, le droit pénal interne répugne à l'idée de juger des étrangers, ayant commis leurs crimes sur des étrangers et à l'étranger; ce n'est pas dans ses habitudes. Si on ajoute à cela le fait que le droit coutumier international reconnaît l'immunité découlant de la qualité officielle de chef d'État devant les cours nationales, des chefs d'État en fonction sont à l'abri de poursuites criminelles durant leurs fonctions devant un tribunal étranger. La Cour internationale de justice (CIJ) a rendu récemment un arrêt dans l'affaire *Congo* c.

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77 Mohamed BENNOUNA, « La Cour pénale internationale », chapitre 59, dans Hervé ASCENSIO, Emmanuel DECAUX et Alain PELLET, *Droit international pénal*, CEDIN Paris X, Éditions A. Pedone, 2000, p. 736.

78 Mouna NAÏM, « Colères, dialogues, menaces, pressions politiques : deux ans de dures négociations avec les familles », *Le Monde*, 10 janvier 2004.

79 M. HENZELIN, *op. cit*., note 64.

Belgique[80] et le jugement fait référence à l'immunité qui s'attache à un gouvernant étranger et confirme qu'elle fait toujours obstacle aux poursuites nationales en matière de crimes contre l'humanité. Selon la Cour internationale de Justice, un ministre des affaires étrangères en exercice ne peut être accusé que si l'État dont il est le représentant lève son immunité ou s'il doit répondre de ses actes devant une juridiction internationale[81].

À court et à moyen terme, c'est donc devant un forum international que l'on peut en pratique mieux réussir à mettre fin à l'impunité des principaux responsables de génocide, de crimes de guerre, crimes contre la paix et crimes contre l'humanité. Les tribunaux nationaux jusqu'à ce jour n'ont pas eu la volonté de le faire, n'ont pas eu la capacité juridique ou matérielle de le faire ou l'ont fait de façon on ne peut plus douteuse et discutable. Ce sont là les conditions suffisantes pour que la CPI prenne la relève et entre en opération, en tant que tribunal complémentaire de tribunaux nationaux « incapables » ou n'ayant pas la « volonté »[82] de combattre l'impunité…

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[80] *Congo* c. *Belgique*, C.I.J., arrêt du 14 février 2002, Affaire relative au mandat d'arrêt du 11 avril 2000.

[81] « Ils ne bénéficient, en premier lieu, en vertu du droit international d'aucune immunité de juridiction pénale dans leur propre pays et peuvent par la suite être traduits devant les juridictions de ce pays conformément aux règles fixées en droit interne.

En deuxième lieu, ils ne bénéficient plus de l'immunité de juridiction à l'étranger si l'État qu'ils représentent ou ont représenté décide de lever cette immunité.

En troisième lieu, dès lors qu'une personne a cessé d'occuper la fonction de ministre des affaires étrangères, elle ne bénéficie plus de la totalité des immunités de juridiction que lui accordait le droit international dans les autres États. À condition d'être compétent selon le droit international, un tribunal d'un État peut juger un ancien ministre des affaires étrangères d'un autre État au titre d'actes accomplis avant ou après la période pendant laquelle il a occupé ces fonctions, ainsi qu'au titre d'actes qui, bien qu'accomplis durant cette période, l'ont été à titre privé.

En quatrième lieu, un ministre des affaires étrangères ou un ancien ministre des affaires étrangères peut faire l'objet de poursuites pénales devant certaines juridictions pénales internationales dès lors que celles-ci sont compétentes » : *Congo* c. *Belgique*, C.I.J., arrêt du 14 février 2002, Affaire relative au mandat d'arrêt du 11 avril 2000. (paragraphe 61) ».

[82] *Statut de Rome*, précité, note 4, art. 17.

2. Le Canada et la CPI

Même si le Canada entretient de bons sentiments humanitaires comme il s'est plu à le démontrer en signant le Traité de Rome, on peut réellement se demander s'il ne s'est pas plutôt lavé les mains en se délestant de l'obligation morale (certains la qualifieraient de juridique[83]) de poursuivre éventuellement devant ses tribunaux des responsables de génocides, de crimes de guerre et contre l'humanité qui pourraient se retrouver sur son territoire. En effet, cela peut être soutenu à partir de l'examen de la *Loi* récente *sur les crimes de guerre et contre l'humanité*[84]. Le législateur canadien exige, et cela est conforme à l'esprit du droit international au sujet de la compétence universelle et du droit canadien sur l'exigence de la présence de l'accusé à son procès, que la personne soupçonnée de crimes de génocide, de guerre et contre l'humanité soit sur son territoire pour l'assujettir à la procédure d'accusation au Canada qui ne peut pas être par contumace[85]. Si techniquement, l'on peut ouvrir une enquête sur un suspect qui ne se trouve pas au Canada, les poursuites à l'égard de ces infractions sont de toute façon subordonnées au consentement personnel du procureur général ou du sous-procureur général du Canada[86] de sorte que les victimes de ces crimes, leurs héritiers ou des ONG les représentant ne peuvent déclencher la poursuite pénale. Bref, l'on doit comprendre par l'exigence de ce consentement personnel du procureur général, que les autorités politiques veulent conserver la mainmise sur de telles poursuites. La réticence à poursuivre les crimes de guerre et contre l'humanité devant les cours canadiennes est bel et bien réelle.

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[83] Comme on en a fait mention précédemment, le Canada a signé des conventions internationales qui prévoient une obligation de poursuivre des étrangers qui se trouvent sur son territoire qui ont commis à l'étranger, sur des étrangers, des crimes visés par la convention. On traduit généralement cette obligation dans la maxime « *aut dedere aut judicare* » : poursuivre ou extrader. Dans les pays de tradition dualiste, une obligation internationale exige son intégration dans le droit interne par voie législative pour devenir coercitive. Le Canada ne semble pas avoir intégré une pareille obligation de poursuivre dans son droit pénal interne lequel repose pour l'essentiel sur une opportunité ou discrétion de poursuivre.

[84] Précitée, note 29.

[85] *Id.*, art. 9(2).

[86] *Id.*, art. 9(3).

Le Canada préfère certainement agir en Ponce Pilate si, de plus, l'on fait le lien entre sa *Loi sur les crimes de guerre et contre l'humanité* et sa politique fondée sur la méfiance de l'étranger en matière d'immigration et d'accueil de réfugiés depuis le 11 septembre 2001. On imagine que le Canada, en filtrant de façon plus pointilleuse l'entrée de ses nouveaux arrivants ou en les expulsant préventivement, évite le dilemme de poursuivre ou de ne pas poursuivre des criminels soupçonnés de crimes de guerre et contre l'humanité devant ses propres tribunaux. D'ailleurs la politique canadienne de refoulement d'arrivants étrangers sur la base de tels soupçons est notoire et bien antérieure au 11 septembre; elle est tout à fait représentative du réflexe « pas dans ma cour ». En tout état de cause, si ses institutions carcérales se vident d'un certain pourcentage de prisonniers de droit commun parce que la criminalité décroît, elles se remplissent d'étrangers détenus sans avoir commis de crimes et qui sont en attente de statut de « personne libre » au Canada[87]. Si les mailles du filet contrôlant l'arrivée d'étrangers sur son sol s'avéraient trop larges et si le Canada acceptait, malgré lui, des criminels soupçonnés de génocide, de crimes de guerre et contre l'humanité, il pourrait fort bien remettre à la CPI tous ceux sur lesquels la Cour internationale peut exercer sa juridiction. Quant aux autres, le Canada pourrait les extrader vers le pays qui offre le meilleur forum pour les juger et finalement, se résoudre à poursuivre le reliquat : ceux qu'il faut absolument poursuivre pour ne pas se faire accuser par les Canadiens de complice de l'impunité.

Rappelons maintenant l'incidence du droit relatif à l'immunité de fonction au regard des poursuites canadiennes en matière de génocides, crimes de guerre et contre l'humanité. Le Canada est appelé comme tous les autres pays du reste, à recevoir des chefs d'État chez lui dont certains pourraient avoir quelques crimes de guerre et contre l'humanité sur la conscience. Le droit jurisprudentiel est à l'effet que l'immunité de fonction est opposable à la mise en branle de la juridiction canadienne en matières criminelles contre un chef étranger. Les relations diplomatiques entre États souverains sont par conséquent sauves. Mais, le Canada réserve tout de même des surprises à un chef d'État en visite qui relèverait de la compétence de la CPI pour des crimes engageant sa responsabilité en

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87 Les Services correctionnels pour adultes mentionnent que les personnes en détention temporaire, comme les personnes en détention aux fins d'immigration, représentent 11 % de la population carcérale : voir *Le Quotidien*, mercredi 30 octobre 2002. Ces chiffres sont pour l'année 2000-2001. On peut supputer que ce taux est plus élevé en ce moment.

vertu du nouveau droit international pénal. Le Canada a modifié sa *Loi sur l'extradition* et énonce à l'article 6.1 que quiconque faisant l'objet d'une demande de remise de la part de la CPI ou par tout tribunal international établi par résolution du Conseil de Sécurité, ne peut bénéficier de l'immunité qui existe en vertu du droit statutaire ou de la common law relativement à son arrestation et son extradition vers la CPI ou un tribunal international *ad hoc*[88]. Il faut par contre comprendre que les chefs d'États en fonction qui ont un lourd passé qui ne peut être l'objet d'examen par la CPI, continuent d'avoir leur abri judiciaire au Canada lors de leurs visites amicales. Quant aux autres concernés par cette coopération canadienne avec la CPI ou autre tribunal *ad hoc*, on imagine qu'ils ne seront plus invités ou seront avisés de ne plus visiter le Canada!

CONCLUSION : TROP DE DROIT PÉNAL, C'EST COMME PAS ASSEZ

Voici un dernier paradoxe en guise de conclusion que nous avons intitulé : Trop de droit pénal, c'est comme pas assez. Cela nous amène à faire des liens entre cette nouvelle institution pénale internationale permanente qu'est la CPI et les mécanismes commerciaux de gouvernance mondiale.

Ce qui frappe le plus, ces dernières décennies, c'est d'avoir vu les massacres se commettre en direct grâce aux moyens techniques d'information. La communauté internationale s'indigne de plus en plus souvent du spectacle de ce désordre mondial et demande à ses commettants politiques nationaux et internationaux de prendre des moyens susceptibles de les prévenir, d'arrêter à tout le moins les atrocités pour en contenir l'ampleur et de se doter de mécanismes efficaces de prévention de la guerre et de ses futurs massacres. Il semble en tout cas depuis une dizaine d'années que pour calmer la clameur publique, les politiciens du monde, pris en défaut de ne pas avoir imaginé et mis en place des politiques et des conditions économiques favorables à la paix, se soient tournés vers la voie judiciaire pénale nationale et/ou internationale comme remède à leur mauvaise conscience. La « solution pénale » est devenue le moyen de prédilection de s'en prendre aux principaux responsables des guerres injustifiables et des massacres innommables que la communauté politique mondiale n'a pas arrêtés en espérant prévenir les massacres de l'avenir avec la technique et la symbolique du pénal.

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[88] *Loi sur l'extradition*, L.C. 1999, c. 18, art. 6.1; L.C. 2000, c. 24, art. 48.

Or, depuis que l'on fait l'expérience politique de ce moyen juridico-judiciaire, plusieurs formes d'expression de la voie judiciaire pénale internationale ont émergé en l'espace de dix ans pour sanctionner des responsables de génocides, crimes de guerre et contre l'humanité. La justice pénale internationale serait conçue à la carte et à la tête du client. Il y aurait en quelque sorte un libre marché pénal qui coïnciderait avec la réalité néo-libérale voulue par les superpuissances économiques qui construisent le monde global à leur façon et dans le sens de leurs intérêts. Le libre marché pénal fonctionnerait en quelque sorte comme l'actuel marché mondial en avantageant les gros criminels et en éliminant le menu fretin. On a créé un TPIY pour Milosevic, un TPIR pour des chefs Hutus du Rwanda (ministres, bourgmestres, para militaires, religieux, journalistes), l'ONU a établi un tribunal international et une commission de vérité pour le Sierra Leone; Charles Taylor du Libéria s'est réfugié au Nigeria tout en faisant l'objet d'un mandat d'arrêt international du Sierra Leone. Charles Taylor réclame l'invalidité du mandat devant la CIJ avec une prétention d'immunité de fonction et en s'autorisant du précédent *Congo* c. *Belgique*[89]. Dans l'intervalle, il est réputé avoir l'équivalent de plusieurs fois le produit national brut de son État dans des coffres suisses ficelés dans le secret bancaire alors que sa population meurt de faim et ne reçoit aucune éducation. Pendant ce temps-là, des bateaux de superpuissances battent pavillon libérien et polluent les mers en ne payant aucune redevance importante pour enrichir quelque peu le peuple du Libéria. Des multinationales achètent le bois libérien sans en payer le juste prix en vertu des lois du marché qui avantagent les gros et égorgent les petits. La République démocratique du Congo, quant à elle, ne compte plus ses victimes et un génocide sévit depuis quelques années sur fond de mines de diamants[90]; la situation paraît intéresser le procureur de la CPI qui a ouvert une enquête récemment[91].

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[89] Extrait de l'intervention du procureur Moreno-Ocampo, devant l'assemblée des États parties, le 9 septembre 2003 : « Au cours d'une conférence de presse tenue le 16 juillet à LaHaye, j'ai d'ores et déjà et déjà expliqué pourquoi il ne serait pas possible d'enquêter sur certaines de ces communications qui nous sont parvenues, j'ai retenu la situation en Ituri, en République Démocratique du Congo, comme étant celle méritant d'être suivie le plus attentivement et de la façon la plus urgente. »

[90] *Rapport au Secrétaire Général du Panel d'experts sur l'exploitation illégale des ressources et autres formes de richesses en République démocratique du Congo,* Conseil de Sécurité des Nations Unies, 16 octobre 2002, S/2002/1146.

[91] M. HENZELIN, *loc. cit*., note 28.

La gouvernance mondiale se présente vidée de contenu politique et éthique et n'est qu'affaire de gestion de la circulation des marchandises et de la fluidité des capitaux. Pour cela, il lui faut un droit de « gérance » supranational sur les États et leurs autorités qui est fort bien rempli par des organismes comme l'OMC et la Banque mondiale. Paradoxalement, le commerce mondial favorise le développement du droit d'ingérence dans la souveraineté des États mais que pour s'en prendre aux misérables États voyous et à leur gang qui mettent en péril la sécurité des transactions et la fluidité du commerce. Le droit des biens est prêt à faire alliance avec le droit du mal (*i.e*. le droit pénal) dans l'espace interétatique mais à la condition que les institutions internationales de régulation économique d'une part et de droit pénal d'autre part protègent ou ne menacent pas les intérêts privés des superpuissances et des multinationales.

La gouvernance mondiale ne conçoit pas l'espace international comme un ordre public mais seulement comme un espace d'ordonnancement d'intérêts privés. Cette organisation du désordre des intérêts individuels contradictoires produirait un bien commun et une institution politique comme l'ONU n'aurait pas à se mêler de définir autrement l'intérêt général. De plus, les seules institutions internationales pénales compatibles avec la régulation marchande dans l'ordre juridique mondial sont des tribunaux à la carte et à la pièce qui n'ont d'autres mandats que de s'en prendre aux autres et aux faibles. À cet égard, une Cour pénale internationale permanente élaborée à plusieurs et dont la compétence peut s'élargir est menaçante pour ce nouvel ordre économique. Elle s'inscrit dans le développement d'un ordre public international qui, pour l'instant, n'est pas voulu par ceux qui sont avantagés par l'ordre juridique marchand et qui ont une position hégémonique dans le marché total.

La gouvernance mondiale n'a pas de morale et c'est pourquoi, elle s'acharne à nous montrer du doigt ceux qui sont réputés commettre les plus graves violations des droits de la personne pour nous détourner de ses pires immoralités et nous les cacher sous le couvert de remontrances adressées à autrui. Pour arriver à nous confondre, il faut nous présenter les droits universels et indivisibles de l'être humain en les amputant de leurs aspects sociaux, économiques et culturels. Affamer un peuple au point de faire mourir ses enfants, lui ravir ses ressources premières et son patrimoine culturel, le priver du minimum vital qui s'exprime en nourritures, éducation et services de santé, ce ne sont encore que des immoralités. C'est seulement lorsque le droit international pénal osera les nommer « crimes contre l'humanité » que nous commencerons à changer

l'ordre juridique mondial et que l'on pourra parler d'un droit commun pour l'humanité[92].

[92] Mireille DELMAS-MARTY, *Vers un droit commun de l'humanité*, Textuel, 1996, (entretien avec Philippe Petit); *Trois défis pour un droit mondial*, Éditions du Seuil, 1998.

The Impact of International Commercial Arbitration on Canadian Law and Courts

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This paper considers the impact of globalization's favoured form of dispute resolution—international commercial arbitration—on Canada's domestic legal system. The most important principle of international commercial arbitration is party autonomy. Party autonomy is used to justify deference to the independence of the arbitration process by national legal systems, both legislatures and courts. That principle relies on the assumption that parties to international commercial arbitrations are of relatively equal bargaining strength and want to be free of national procedural and substantive laws.

When the principle of party autonomy and the practices of international commercial arbitration are transferred to the domestic arbitration arena and applied outside the context of commercial transactions, the justification for judicial deference and non-intervention in the arbitration process is considerably weaker. The principle of party autonomy, and hence deference to the arbitration process, is not as accepted by Canadian courts in the domestic context as it is in the international commercial context. While some decisions extend the same deference to the domestic arbitration process, others apply a higher level of judicial scrutiny. Some of this lack of deference to arbitral autonomy appears to be a remnant of judicial attitudes prevalent before the mid-1980s. Other judges, however, appear willing to scrutinize domestic arbitration agreements on the principled basis of respect for party autonomy.

My focus in this paper is on consensual, domestic arbitrations. Consensual arbitration is a process in which a tribunal other than a court decides a dispute between two or more parties based on a prior agreement by which the parties agreed to honour the decision of the tribunal.[1] The only interactions between the courts and consensual arbitration that I am concerned with in this paper are those facilitated by modern domestic

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[1] Institute of Law Research and Reform, *Towards a New Arbitration Act for Alberta*, Issues Paper No. 1 (Edmonton: Institute of Law Research and Reform, 1987) at 1. Arbitrations mandated by statute are not considered in this paper.

arbitration legislation, that is, cases brought since 1986 in British Columbia[2] and Québec,[3] since 1991 in Alberta[4] and Ontario,[5] since 1992 in Saskatchewan[6] and New Brunswick,[7] since 1997 in Manitoba,[8] and since 1999 in Nova Scotia.[9] Interactions between the courts and arbitration under provincial statutes still modeled on the English *Arbitration Act, 1889*[10] are not considered.[11]

Part II of this paper discusses globalization and its relationship to international commercial arbitration, the principle of party autonomy, the competing principle of judicial scrutiny, and the theories underlying both of these principles. In Part III, I briefly summarize the reform of Canadian arbitration legislation to accommodate the principle of party autonomy, both in international commercial and domestic arbitrations. Part IV looks at Canadian courts' responses to this change in the legislation in the context of applications to courts to stay litigation in favour of arbitration. There are other contentious areas of interaction, most notably applications for leave to appeal arbitration awards, appeals of awards and applications to set aside awards.[12] Stay applications are, however, the most common and they often raise access to justice issues.

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2 *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 [hereinafter *BCCAA*].

3 *An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73, arts. 1-2. Provisions on arbitration have been inserted in the *Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1926.1-1926.6 [hereinafter *C.C.Q.*] and the *Code of Civil Procedure*, R.S.Q., c. C-25, as am. by S.Q. 1986, c. 73, and S.Q. 1992, c. 57, arts. 940-951.2 [hereinafter *C.C.P.*].

4 *Arbitration Act*, S.A. 1991, c. A-43.1 [hereinafter *AAA*].

5 *Arbitration Act*, *1991*, S.O. 1991, c. 17 [hereinafter *OAA*].

6 *Arbitration Act*, S.S. 1992, c. A-24.1 [hereinafter *SAA*].

7 *Arbitration Act*, S.N.B. 1992, c. A-10.1 [hereinafter *NBAA*].

8 *Arbitration Act*, S.M. 1997, c. 4, C.C.S.M. c. A120 [hereinafter *MAA*].

9 *Commercial Arbitration Act*, S.N.S. 1999, c. 5 [hereinafter *NSCAA*].

10 *Arbitration Act, 1889* (U.K.), 52 & 53 Vict., c. 49.

11 *Arbitration Act*, R.S.N. 1990, c. A-14; *Arbitration Act*, R.S.P.E.I. 1988, c. A-16; *Arbitration Act*, R.S.Y. 1986, c. 7; *Arbitration Act*, R.S.N.W.T. 1988, c. A-5 (in force in Nunavut under the *Nunavut Act*, S.C. 1993, c. 28).

12 See the chart, "Domestic Arbitrations by Issue" in Appendix B, below.

I. GLOBALIZATION, INTERNATIONAL COMMERCIAL ARBITRATION AND PARTY AUTONOMY

The meaning and "badges" of globalization are discussed elsewhere in these Conference proceedings in papers by William A.W. Neilson and Patricia Hughes. For the purposes of this paper, I would highlight that globalization is generally associated with economic development, the internationalization of capital and financial markets, and the movement towards regional economic and political bodies.[13] Banks and telecommunication, transportation, oil and gas, and manufacturing operations now routinely conduct business across national boundaries.[14] National borders and territory-based legal systems are less and less of a barrier to the business of transnational corporations, capital flow and commerce.

Most relevant to this paper is the recognition that one of the central phenomena of globalization is the "proliferation of actors" on the law-making scene.[15] What is described by the concept "globalization" includes competition in law, in approaches to law, and in approaches to the state and governance in general.[16] As other participants in this Conference have noted, the growth of extra-judicial forms of dispute resolution threatens to displace domestic judicial systems by privatizing the settlement of disputes and taking them outside the courts and, sometimes, outside the law.[17]

Financial and commercial entities active in transnational trade and commerce want to avoid being "trapped in domestic, ethnocentric judicial

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[13] J. Stopford & S. Strange, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991) at 5.

[14] P.F. Drucker, "The Global Economy and the Nation-State" (1997) 76 Foreign Affairs 159 at 168.

[15] A.-M. Slaughter, "Breaking Out: The Proliferation of Actors in the International System" in Y. Dezalay & B.G. Garth, eds., *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002) 12 at 13.

[16] Y. Dezalay & B.G. Garth, "Legitimating the New Legal Orthodoxy" in Dezalay & Garth, *ibid.* 306 at 308. See also K. Jayasuriya, "Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?" (2001) 8 Constellations 442.

[17] M.O. Chibundu, "Globalizing the Rule of Law: Some Thoughts at and on the Periphery" (1999) 7 Ind. J. Global Leg. Stud. 79 at 81.

systems"[18] should disputes arise. They want to avoid both the substantive and procedural laws of foreign states which may be totally alien and unacceptable to one or both of the parties.[19] As one commentator notes:

> "The most typical international case is an arbitration agreement with ensuing arbitral proceedings between two parties who have their places of business in different countries. Each of the parties will probably have confidence only in its own law and misgivings about the law of the other party. The reason is not necessarily that the other law is in fact less favourable than one's own law but that as a foreign law it is simply not so familiar and thus often perceived as strange. As in the similar situation of the choice of substantive law of the contract, the result is often to choose the law of a third country with which neither party is really familiar. In the context of arbitration, this means to choose a so-called 'neutral' venue which is equally foreign to both parties."[20]

The avoidance of local and national courts and legal systems is the main reason for the popularity of international commercial arbitration as globalization's dispute resolution process of choice.[21] It is argued that international trade and other transnational transactions, including Internet transactions, require a body of rules that is free from the idiosyncratic

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[18] E. Mendes, "Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration" (1986) 3 J. Int'l Arb. 71 at 81.

[19] *Ibid.* This desire to avoid national legal systems is also illustrated by the growing use of international commercial arbitration in foreign direct investment (FDI) disputes between states and private persons such as those overseen by the International Centre for Settlement of Investment Disputes (ICSID) and the work of the Iran-United States Claims tribunal. Core provisions of bilateral investment treaties (BITs) include dispute settlement using arbitration. The particular dispute settlement provisions in NAFTA's controversial Chapter 11 are based on those in the standard United States BIT. Under these procedures in the NAFTA, private investors may seek arbitration of a dispute against a signing party to NAFTA. The basic model for Chapter 11's dispute resolution process is private international commercial arbitration.

[20] G. Herrmann, "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Petar Šarcevic, *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989) 3 at 5.

[21] L. Wilberforce, "Resolving International Commercial Arbitration Disputes: The Alternatives," in R.K. Paterson & B.J. Thompson, *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Toronto: Carswell, 1987) 7 at 7.

differences that arise between national legal systems.[22] It has been said that creating a "viable international adjudicative system which is truly supranational and multi-cultural in character, to meet the needs of the international business community" is one of the most challenging tasks facing the global community.[23] And, it is argued, specialized systems of law devised and employed by groups of traders are the models of law-making towards which, in a deregulated, market-driven world, we should all aspire.[24]

A basic tenet of international commercial arbitration law, therefore, is the idea that disputants should have the greatest freedom to select the rules applicable to the resolution of their dispute: "The principle of party autonomy seeks to free parties to international business disputes from the limitations and idiosyncrasies of particular legal systems and to fulfil their more cosmopolitan needs and expectations."[25]

In all of the late 20th century reforms of arbitration law, including those in Canada, a primary tension exists between two principles:

- party autonomy—that is, that arbitration is founded on the agreement of the parties, and that agreement should be respected even though a court may have reservations about its terms, the process followed or the result achieved; and

- judicial scrutiny—that is, that courts have a public right and responsibility as organs of the state to ensure that the process of arbitration operates in all cases according to a uniform, if minimum, standard imposed by law.[26]

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22 R.D. Cooter, "Decentralized Law for a Complex Economy" (1994) 23 Sw. U. L. Rev. 443.

23 Mendes, *supra* note 18 at 92.

24 Cooter, *supra* note 22. Such an assertion, of course, assumes that law exists to serve the economy rather than other ends: J. Goldring, "Consumer Protection, Globalization and Democracy" (1998) 6 Cardozo J. Int'l & Comp. L. 1 at 56.

25 R.K. Paterson, "International Commercial Arbitration: An Overview" in Paterson & Thompson, *supra* note 21, 113 at 114.

26 Law Commission, *Report No. 20: Arbitration* (Welland: Law Commission, 1991) at 65 [hereinafter *New Zealand Law Commission*]. The tension is also reflected in the division between the majority report and the dissent on the extent of judicial supervision in the Law Reform Commission of British Columbia, *Report on Arbitration* (Vancouver: Law Reform Commission of British Columbia, 1982). The majority stated that "[j]ustice, in

This tension is related to the conceptual basis for arbitration. As the New Zealand Law Commission noted in its 1991 report on arbitration law reform, "[t]here are various theories which have been put forward to explain arbitration—each with consequences for where the balance between party autonomy and judicial scrutiny should be."[27]

In the "Contractual Theory" of international commercial arbitration, the arbitration agreement is seen as an independent source of arbitrators' authority. One definition of arbitration from this perspective is as follows:

> "Arbitration is a device whereby the settlement of the question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authority of a state, and who are to proceed and decide the case on the basis of such an agreement."[28]

The argument here is that the parties voluntarily agree to submit their disputes to arbitration, to appoint the arbitrator and, most importantly, to accept his award as having binding force.[29] Once authorized by the parties to

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our view, should not be subordinated to considerations of speed and convenience" *ibid*. at 74. The dissent insisted that "the most important feature of an arbitration system is that it was intended to be quick and final" and "we must be sensitive to the needs of the people whom the system will serve and recognize their needs and expectations rather than the existing system they have sought to avoid" *ibid*. at 87-88.

27 *New Zealand Law Commission*, *ibid*. at 66.

28 R. David, *Arbitration in International Trade* (Deventer: Kluwer, 1985) at 5. See also H.C. Alvarez, "Introduction to International Commercial Arbitration", Chapter 1 in *Commercial Arbitration* (Vancouver: Continuing Legal Education Society of British Columbia, 1986) at 1.1.02.

29 My use of the male pronoun in referring to the arbitrator is gender-specific. A September 2003 scroll through the list of arbitrators on the web sites of various arbitration organizations revealed that more than 90 per cent are male. See the ADR Institute of Canada web site at http://www.amic.org/, the British Columbia International Commercial Arbitration Centre web site at http://www.bcicac.com/ and the Québec National and International Commercial Arbitration Centre web site at http://www.cacniq.org/en/. There has not yet been much concern in Canada about who is deciding the cases referred to arbitration. The issue of gender in arbitration was addressed by an American Arbitration Association Task Force: see "Women and Diversity in ADR: A Roundtable", (April/Sept. 1996) Dispute Resolution Journal 65 at 66. For a detailed analysis of the elite group of transnational lawyers that make up the field of international commercial arbitrators, see Y. Dezalay & B.G. Garth, *Dealing in Virtue: International Commercial*

make the award, the tribunal acts as an agent of the parties, and the award is binding on them as an agreement made on their behalf by their agent.[30] This explanation of the legal nature of arbitration reduces the role of national law to a minimum.[31]

The ascendency of the Contractual Theory as the predominant explanation for arbitration was assured in the international commercial arena quite some time ago.[32] For example, a mid-1980s ICSID award stated: "Under the doctrine of party autonomy, parties to a contract are free to choose for themselves the law which is to govern their relationship. This doctrine has gained almost universal acceptance, particularly in international commercial arbitrations."[33]

The United States Federal Court of Appeal in 1987 proclaimed: "The right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties."[34] The privatization of law under this perspective has led to charges of lawlessness[35] and incompatibility with the rule of law.[36]

Arbitration and the Construction of a Transnational Legal Order (Chicago: University of Chicago Press, 1996).

30 *New Zealand Law Commission*, *supra* note 26 at 66-67. See also S.J. Toope, *Mixed International Arbitrations: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius Publications, 1990) at 9.

31 J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry: Oceana, 1978) at 56-57.

32 *Ibid*. at 51-66. See also Alvarez, *supra* note 28, "Introduction to International Commercial Arbitration", Chapter 1 in *Commercial Arbitration* (Vancouver: Continuing Legal Education Society of British Columbia, 1986); P. Fouchard, *L'Arbitrage commercial international* (Paris: Dalloz, 1965) at 7-12; T.E. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce" (1984) 19 Texas Int'l L. Rev. 34. Each theory is contested: see *e.g*. F.A. Mann, "Lex Facit Arbitrum", reprinted in (1986) Arbitration Int'l 241; A. Kassis, *Théorie générale des usages du commerce* (Paris: L.G.D.J., 1984).

33 *LETCO* v. *Republic of Liberia*, ICSID Award, October 24, 1984 and March 31, 1986, reprinted in (1988) 13 Yearbook of Commercial Arbitration 35 at 42-43.

34 *National Oil Co. of Iran* v. *Ashland Oil, Inc*. 817, F.2d 326 (5th Cir. 1987).

35 P.J. McConnaughay, "The Risks And Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration" (1999) 93 Nw. U.L. Rev. 453. McConnaughay states, at 453:

> It is entirely possible today for parties to conduct an international arbitration in a nation that imposes no requirements or review whatsoever on the procedure or

The main alternative to the Contractual Theory is the "Jurisdictional Theory" which holds that the real authority of arbitration derives not from the contract between the parties, but from the recognition accorded by the state.[37] The validity of the arbitration agreement, the powers of the arbitrator, the act of adjudication by the arbitrator and the enforcement of the arbitrator's award are all seen as depending on the law of the enforcing state.[38] The arbitrator, in this theory, is more than an agent of the parties because he exercises a power that is beyond the authority of the parties to endow him. Therefore, the court, representing the state and applying its law, is entitled to insist on certain conditions. The courts need not recognize only the immediate needs and expectations of the parties before them; they are entitled to recognize, for instance, state interests in maintaining a fair and uniform system of law and order.[39] The uniformity policy was the primary rationale for court intervention in England for a long time. Today court intervention is mainly justified by the felt need to protect weaker contractual parties from the consequences of their contracts or framed in terms of "procedural fairness."[40] The result of adopting this theory is to subject arbitration to domestic law and assimilate arbitrators to judges.[41]

The most important convention on international commercial arbitration and the most important impetus to the growth of international commercial arbitration in the latter half of the twentieth century is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[42] The New York

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> outcome of the arbitration. It is possible for the parties to elect, or for the arbitrators to decide, that the "law" governing the merits of the arbitration is basically no law at all. Further, it is possible for the parties to escape meaningful review of their resulting arbitral award and to secure the award's judicial enforcement in virtually all developed nations of the world. All but the last of these events, moreover, may occur in complete secrecy.

36 W.E. Scheuerman, "Economic Globalization and the Rule of Law" (1999) 6 Constellations 3. Scheuerman notes, at 3, that dispute resolution processes associated with globalization exhibit few of the virtues normally ascribed to the rule of law, relying instead on *ad hoc*, discretionary, closed and non-transparent legal forms.

37 *New Zealand Law Commission*, *supra* note 26 at 66-67.

38 Lew, *supra* note 31 at 52.

39 *New Zealand Law Commission*, *supra* note 26 at 66-67.

40 *Ibid*.

41 Lew, *supra* note 31 at 53-54.

42 UN Doc. E/Conf. 26/9/Rev. 1, reprinted in 330 U.N.T.S. 38 (in force June 7, 1959) [hereinafter the *New York Convention*]. According to C.O.D. Branson, "The Enforcement

Convention is an example of what William A.W. Neilson, in his paper for these Conference proceedings, calls "unification". When the New York Convention entered into force in 1959, it put in place a treaty system which ensured the recognition and enforcement of foreign arbitral awards within contracting states. Nations adopted it unchanged as domestic law with full force and effect in their legal systems. The New York Convention limits the grounds for judicial review of awards and excludes any judicial review on the merits of an award by the court where enforcement is sought. It does not, however, contain any rules to guide the arbitration process and says nothing about control or supervision of the arbitral process by the courts at the place of arbitration. Those rules were supplied, in 1985, by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[43] This blueprint for the unification of national laws embodies mid-1980s trends in international commercial arbitration and, particularly, American trends to allow the arbitration of previously non-arbitrable issues and to compel unwilling parties to arbitrate.[44]

The central philosophy of the Model Law is one of party autonomy. The Model Law's guiding principles can be summarized as follows:

- parties should be free to design the arbitral process as they see fit, but the arbitral process should be "fair" to both parties;
- parties who enter into valid arbitration agreements should be held to those agreements;
- the arbitration tribunal should be neutral and as unbiased as possible, and should be empowered to determine its own jurisdiction;

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of International Commercial Arbitration Agreements in Canada" (2000) 16 Arbitration International 19 at 19, the New York Convention "the greatest contributing factor to the acceptance and use of international commercial arbitration today."

[43] UN Doc A/40/17 (1985), reprinted in (1985) 24 I.L.M. 1302 [hereinafter the *Model Law*]. See also E. Chiasson, "Canada: No Man's Land No More" (1986) J. Int'l Arb. 67.

[44] *Mitsubushi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (U.S.S.C.) [hereinafter *Mitsubishi*].

- the arbitration should proceed in confidence without substantial intervention by the courts; and

- the resulting award should be readily enforceable, subject to review only on the basis of a limited and specified list of fatal flaws in form or procedure.[45]

It is important to note that recognition of party autonomy as the basic norm of international commercial arbitration is not merely a consequence of theorizing that arbitration rests on the agreement of the parties. It is also the result of policy considerations geared to economic globalization.[46] As Henry J. noted In *Rio Algon Ltd.* v. *Sammi Steel Co.*, the purpose and spirit of the adoption of the Model Law by Ontario was to make commercial arbitration law in that province consistent with the law of other trading countries "so as to enhance and encourage international commerce in Ontario and the resolution of disputes by rules of international commercial arbitration ..."[47]

II. REFORMING CANADA'S ARBITRATION LEGISLATION

The adoption of the New York Convention and the Model Law in Canada in 1986 has been discussed extensively.[48] The Manitoba Law Reform Commission's 1994 report on arbitration provides a concise summary:

> "Federal and provincial government apathy about arbitration reform started to change in the 1980s due to the desire to attract international arbitration business. Canada was one of the last major international trading countries to accede to the 1958 United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, but it

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[45] R.A. Pepper, "Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration"(1998) 36 Osgoode Hall L.J. 807 at para. 8. These central features and the primary motivations for their adoption are canvassed in greater detail in Uniform Law Conference of Canada, *Proceedings of the Seventy-Second Annual Meeting of the Uniform Law Conference of Canada* (Toronto: Uniform Law Conference of Canada, 1990) at 88 [hereinafter *ULCC 1990*] and in Mendes, *supra* note 18.

[46] Herrmann, *supra* note 20 at 9.

[47] (1991), 47 C.P.C. (2d) 251 at 257 (Ont. Gen. Div.).

[48] See *e.g*. Chiasson, *supra* note 43; Mendes, *supra* note 18; Paterson & Thompson, *supra* note 21; H. Alvarez, "The Role of Arbitration in Canada—New Perspectives" (1987) 21 U.B.C.L. Rev. 247; and J.E.C. Brierley, "Québec's New (1986) Arbitration Law" (1987-88) 13 C.B.L.J. 58.

did so finally in 1986. This federal action was supported and implemented by uniform provincial statutes passed in 1986, the *International Commercial Arbitration Act*(s).

Those statutes are patterned on the 1985 legislative model developed by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL model was developed by a group of experts in the field of international arbitration and was reflective of the most progressive, developing views. The implementation of this model was 'like going from the 19th century to the 21st century' in international arbitration law.

This momentum for change has been continued in the area of domestic arbitration by some provinces. In 1986, British Columbia enacted a new *Commercial Arbitration Act*, based on earlier recommendations of the British Columbia Law Reform Commission which pre-dated the UNCITRAL model but anticipated many of its general reforms. In the civil law arena, Québec also adopted a more progressive domestic arbitration law in 1986.

The Alberta Law Reform Institute did major work in adapting the UNCITRAL model for provincial domestic arbitration use; this work was furthered by the Uniform Law Conference of Canada which in 1990 produced a model *Uniform Arbitration Act.* This model uniform statute forms the basis for the new arbitration legislation enacted in Alberta, Ontario and Saskatchewan. New Brunswick has also passed an Act based on this uniform model..."[49]

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[49] Manitoba Law Reform Commission, *Arbitration*, Report #85 (1994) at 3 [footnotes omitted]. See the *United Nations Foreign Arbitral Awards Convention Act*, S.C. 1986, c. 21; *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17; *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233; *International Commercial Arbitration Act*, S.M. 1986-87, c. 32, C.C.S.M., c. C151; *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2; *International Commercial Arbitration Act*, R.S.N. 1990, c. I-15; *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6; *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234; *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9; *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5; *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2; *International Commercial Arbitration Act*, R.S.Y. 1986 (Supp.), c. 14 [hereinafter collectively *International Commercial Arbitration Act*s]. The history is reported in greater detail in the Preface to Paterson & Thompson, *supra* note 21 at vi-x. Paterson and Thompson attribute the most serious obstacle to creating a legal climate suitable for the business of resolving international commercial disputes as being "an attitudinal problem" that changed only when Canadian business began to take international trade more seriously.

Subsequently, Manitoba enacted its own new domestic arbitration law, modeled on the Alberta legislation.[50] Nova Scotia also passed a new *Commercial Arbitration Act* in 1999,[51] bringing to eight the number of provinces with domestic arbitration statutes strongly influenced by the UNCITRAL Model Law designed for international commercial arbitrations.

The organization and principles of the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada (ULCC) in 1990 are recognizably those of the Model Law:

> "Generally speaking, the *only interests* involved in an arbitration are those of the parties. While it may be argued that a whole mandatory scheme should be imposed upon them for their own good, we see no justification for doing so. *Party control is one fundamental principle* upon which arbitration law should be based."[52]

However, the ULCC did conclude there was a greater role for judicial scrutiny of domestic arbitral procedure and awards.[53] While the *International Commercial Arbitration Acts* apply only to "international" and "commercial" arbitration agreements,[54] usually entered into by reasonably sophisticated

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[50] *MAA*, *supra* note 8.

[51] *NSCAA*, *supra* note 9.

[52] "*Proceedings of the Seventy-first Annual Meeting*" (Uniform Law Conference of Canada, Yellowknife, Northwest Territories, August 1989) [hereinafter *ULCC 1989*] [emphasis added].

[53] *ULCC 1990*, *supra* note 45 at 88-89.

[54] The adoption of the Model Law created this distinction between international commercial and domestic arbitrations in Canada. With regard to being "international", the most important provision, governing 90 to 98% of the cases regarded as international, is art. 1(3)(a) which provides that if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, then the arbitration is international. See Herrmann, *supra* note 20 at 22. Thus, for the most part, "international" means across state boundaries. There is no definition of "commercial" in the Model Law. Most Canadian common law jurisdictions have enacted a provision that slightly expands the application of the Model Law by stating it applies "in respect of differences arising out of commercial legal relationships, whether contractual or not." See *e.g.* the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, s. 2(2). However, the *International Commercial Arbitration Act*, R.S.O. 1990, which does not define "commercial" and restricts "international" by not adopting art. 1(3)(c) which states that an arbitration is international if "the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

commercial parties assumed to have relatively equal bargaining power, the domestic arbitration legislation applies to all forms of arbitration, whether commercial or not. The Uniform Arbitration Act, and the provincial statutes that shaped it or are modeled after it, are therefore based upon the following principles:

- fairness, or equality of treatment
- control by the parties (except as required by equality of treatment), and
- efficiency, or satisfaction of the interests of the parties (except as required by equality of treatment, and except as agreed by the parties).[55]

Fairness, or equality of treatment, represents the partial adoption of the Jurisdictional Theory. However, the Contractual Theory and party autonomy are well represented by the second and third principles. In the third—efficiency—we also see economic globalization's influence.

III. RESHAPING CANADIAN JUDICIAL DECISION-MAKING

Canada was one of the last industrial nations to sign the New York Convention, albeit the first to adopt the Model Law.[56] Our courts lag anywhere from five to fifteen years behind their United States counterparts in adopting a deferential attitude to arbitration. It was in the mid-1970s that American courts began to shed their hostility toward arbitral proceedings, characterizing the change as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[57] The key to the evolution of judge-made

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[55] *ULCC 1989*, *supra* note 52.

[56] See text accompanying note 52.

[57] *Scherk* v. *Alberto Culver*, 417 U.S. 506 at 516 (1974). A further step was taken in 1985 in *Mitsubishi*, *supra* note 44, when the United States Supreme Court overturned a series of lower court decisions that held the public interest in the enforcement of antitrust laws and the nature of antitrust claims made them inappropriate for arbitration. A brief history of the change in the American courts, attitude to arbitration and its acceptance of the New York Convention and the principle of party autonomy can be found in M.F. Hoellering, "International Commercial Arbitration: The United States Perspective" in Paterson & Thompson, *supra* note 21 at 17.

arbitration law in the United States is party autonomy and the courts have maintained a non-intervention policy in both domestic and international arbitrations since the early 1980s.[58]

Despite the late start here, broad deference to arbitration under the Model Law has been shown in almost all Canadian international commercial arbitration cases.[59] For example, the Ontario Court of Appeal in 1994 acknowledged:

> "The purpose of the United Nations Conventions and legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale."[60]

The norm of party autonomy and its underlying Contractual Theory has been explicitly recognized in cases such as *Cangene Corp.* v. *Octapharma AG*,[61] where Morse J. noted that "[c]ourts in Canada and the United States have, on the basis of freedom of contract, generally accepted and approved of the arbitration contemplated in the Act and there is little room for judicial intervention in the process."[62]

The question is whether the Contractual Theory predominates in domestic arbitration as it does in international commercial arbitration. To what extent have Canadian judges adopted the norm of party autonomy in domestic and, particularly, consumer cases? To what extent is the principle of judicial scrutiny, which was recognized as having a greater role to play in the

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58 Hoellering, *ibid*. at 18.

59 R.O. Chibueze, "The Adoption and Application of the Model Law in Canada" (2001) 18 J. Int'l Arbitration 191 at 197.

60 *Automatic Systems Inc*. v. *Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.) at 264.

61 (2000) 147 Man.R. (2d) 228 (QB) relying on *BWV Investments Ltd.* v. *Saskferco Products Inc*. (1995), 137 Sask. L.R. 238 (C.A.).

62 The relationship between globalization and the principle of party autonomy has also been acknowledged. See text accompanying note 47.

domestic context by those drafting the domestic legislation,[63] incorporated into judicial decisions?

For at least 500 years, judges have shown discomfort with their relationship to the arbitral process.[64] However, in the past ten to twenty years, numerous law reform commission reports and legislative changes in Canada's arbitration laws have opened the door to a change in judicial attitudes towards arbitration.[65] The latest word from the Supreme Court of Canada on the relationship between the Canadian courts and arbitration—*Éditions Chouette (1987) Inc.* c. *Desputeaux*[66]—is a particularly strong endorsement of the norm of party autonomy in arbitration and the expectation of deference by the judiciary to the arbitration process. In the context of limits on judicial review of the validity of arbitral decisions, the Supreme Court reversed a Québec Court of Appeal decision that an arbitrator must apply the rules of public order correctly, an approach that LeBel J. held that runs "counter to the fundamental principle of the autonomy of arbitration."[67] And while acknowledging "limitations placed on the autonomy of the arbitration system",[68] just as there are limitations on the scope of individual legal action and contractual freedom,[69] LeBel J. continued by noting the

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63 See text accompanying note 55.

64 See D. Roebuck, "The Myth of Judicial Jealousy" (1994) Arb. Int'l 395 and R.B. von Mehren, "From *Vynior's Case* to *Mitsubishi* and Public Law" (1986) 12 Brooklyn J. Int'l L. 583.

65 L. Biukovic, "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration" (1998) 30 C.B.L.J. 376 at 379.

66 2003 SCC 17 [hereinafter *Éditions Chouette*]. The Quebec National and International Commercial Arbitration Centre (CACNIQ) was one of the interveners in the action, broadly supporting the appellants in their arguments for the need to protect the role of arbitration. In a March 21, 2003 press release on its web site at http://www.cacniq.org/en/, the arbitration centre noted: "In a decision which is very favourable to arbitration and which adopted, in substance, arguments the CACNIQ presented as intervener, the Supreme Court of Canada has set aside a decision of the Quebec Court of Appeal that had annulled an arbitral award on various grounds." The relevant Québec statutory framework, unlike that of the common law provinces, makes almost no statutory distinction between international and domestic arbitrations and thus some caution must be exercised in applying *Éditions Chouette* to cases under the domestic legislation of other provinces.

67 *Ibid*. at para. 66.

68 *Ibid*. at para. 51.

69 *Ibid*. at para. 52.

concept of public order, in the context of arbitration, had to be interpreted and applied with regard to:

> "legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. For that reason, *in order to preserve decision-making autonomy within the arbitration system*, it is important that we avoid extensive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that autonomy, contrary to the clear legislative approach and the judicial policy based on it."[70]

Although a thorough analysis of the approach of Canadian courts to the modern domestic arbitration legislation is beyond the scope of this paper, I want to highlight some of the issues in the interpretation and application of that legislation which reveal the tension between the principles of party autonomy and judicial supervision. The question of the influence of international commercial arbitration's norm of party autonomy will be examined in the context of applications to stay court proceedings in favour of arbitration, applications that speak directly to the judiciary's relationship to arbitration. Although over two hundred cases have been decided under the modern domestic arbitration legislation,[71] I consider only five of the many issues raised in stay applications. Only a few of the cases considering those five issues will be discussed: cases that illustrate the tension between the two supposedly contradictory principles of party autonomy and judicial scrutiny. In the last section of this part, I look at two recent cases suggesting the process of the "consumerization" of domestic arbitration has begun in Canada.

A. Applications to Stay Court Proceedings in Favour of Arbitration

All of the modern domestic arbitration legislation contains a provision stating the courts cannot intervene in the arbitration process except as

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[70] *Ibid*. [emphasis added].

[71] See Appendix B, below for a breakdown of these cases by type of application before the court, by year, and by province. The cases were accumulated using the digests in the Canadian Abridgement Online, through queries for "arbitration" restricted by date in each of the relevant provinces' "Judgments" databases in Quicklaw, and through references to other cases in those located through the first two sources.

expressly allowed by that legislation.[72] Courts are expressly allowed to intervene in order to prevent the preemption of arbitration by court actions.[73] If a party to an arbitration agreement brings an action in court about a matter which it agreed to submit to arbitration, the court in which the action is brought must, when asked, stay the action except in the specific, limited circumstances listed in the legislation. I will focus on courts' responses to the apparent removal of their discretion to refuse to stay court proceedings and courts' approaches to interpreting these stay provisions.

1. From "May" to "Must" and "Shall"

The old arbitration acts, modeled on the English *Arbitration Act, 1889*,[74] made the granting of a stay a discretionary matter for the courts.[75] It was the exercise of that discretion which is said to have led legislatures to regard refusals of stays as judicial intervention.[76]

Almost all courts have taken note of the change in the domestic arbitration legislation which appears to make the granting of stays mandatory if the enumerated preconditions are met. For example, in *International Resource Management (Canada) Ltd.* v. *Kappa Energy (Yemen) Inc*., the Alberta Court of Appeal heard an appeal from an order staying legal proceedings conditionally and noted: "[T]he Arbitration Act section 7 has rewritten the rules for a stay. The court *must* stay a suit in favour of

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[72] *BCCAA*, *supra* note 2, s. 32; *AAA*, *supra* note 4, s. 6; *SAA*, *supra* note 6, s. 7; *MAA*, *supra* note 8, s. 6; *NSCAA*, *supra* note 9, s. 8; *NBAA*, *supra* note 7, s. 6; *OAA*, *supra* note 5, s. 6; art. 940.3 C.C.P.

[73] *BCCAA*, *ibid*., s. 15; *AAA*, *ibid*., s. 7; *SAA*, *ibid*., s. 8; *MAA*, *ibid.*, s. 7; *NSAA*, *ibid.*, s. 9; *NBAA*, *ibid*., s. 7; *OAA*, *ibid*., s.7; art. 940.3 CCP. See Appendix A, below for the wording of these sections.

[74] *Supra* note 10.

[75] See *e.g. OAA*, *supra* note 5, which provided that if a party to an arbitration agreement applied to court to stay court proceedings "a judge of that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission … *may* make an order staying the proceeding" [emphasis added].

[76] *Gulf Canada Resources Ltd.* v. *Arochem International Ltd.* (1992), 66 B.C.L.R. (2nd) 113 (C.A.).

arbitration when the plaintiff is a party to the contract for arbitration. It has *no choice*."[77]

The court later emphasized that "the general scheme of the Act, and the evil to remedy for which it was passed, suggest an inflexible duty to stay, with few and clear exceptions."[78] This same point was acknowledged in *Deluce Holdings*, an Ontario case:

> "Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed: the court *must* stay the court proceeding and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration."[79]

However, in some cases decided under the modern domestic arbitration statutes, courts have continued to act as though they had a discretion to refuse a stay. For example, in *North Sea Products Ltd.* v. *Carmar Fish Corp.*,[80] the British Columbia Court of Appeal heard an application for leave to appeal from a dismissal of North Sea's stay application. That stay application had been dismissed on the basis that the dispute was outside the scope of the arbitration clause. Southin J., in a brief oral judgment refusing leave, indicated her "tentative view" that the arbitration clause did not include licensing disputes.[81] However, the main reason for her dismissal appeared to be the perceived futility of a stay of the court proceedings:

> "One of the considerations on granting leave is whether there is practical utility in the appeal. It seems to me there is no practical utility for these parties in this proposed appeal over the issue of whether the licensing questions are within the arbitration clause. They can litigate that in this court. They may end up litigating it again

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77 (2001), 16 B.L.R. (3d) 163, 92 Alta. L.R. (3d) 25, 281 A.R. 373, 2001 ABCA 146 (C.A.) at para. 12 [emphasis added].

78 *Ibid*. at para. 20.

79 *Deluce Holdings Inc.* v. *Air Canada* (1992), 12 O.R. (3d) 131 at 148 (Gen. Div.) [hereinafter *Deluce Holdings*] [emphasis added].

80 [1998] B.C.J. No. 3097 (S.C.), online: QL (BCJ); [1998] B.C.J. No. 2758 (C.A.), online: QL (BCJ). The dispute concerned monies owing under a herring roe processing contract between North Sea and Carmar Fish.

81 *Ibid.* at para. 8.

> in the Court below. If the matter were to go to arbitration, and the arbitrator were to say, 'Yes, the thing is included,' there would then, no doubt, be an attack on the arbitration award on the question of jurisdiction, and this case would go on forever unresolved."[82]

There is no discussion of whether a court can hear an appeal of a refusal of a stay application, no discussion of the statutory provision governing stays, and no discussion of who decides questions of the arbitrator's jurisdiction. Instead, Southin J. essentially refused leave to appeal the stay refusal because she perceived the court to be a better forum in which to decide the issues. However, the appropriateness or convenience of the forum are not relevant considerations under the new domestic arbitration legislation, as other courts have noted.[83]

At the opposite extreme of the approach taken in *North Sea Products* is that seen in *AMEC E & C Services Ltd.* v. *Nova Chemicals (Canada) Ltd*.[84] AMEC applied to the court for a declaration that any liability they might have had under a contract with Nova Chemicals had expired with the passage of time.[85] During the hearing of the application, Sachs J. raised the question of whether the issues in the application were within the scope of the arbitration clause in the parties' contract. While acknowledging the "relevant statutory provisions"[86] contemplated a stay order would be made on application by a party to an arbitration agreement, Sachs J. held that court

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[82] *Ibid.* at para. 10.

[83] See *e.g. Scotia Realty Ltd.* v. *Olympia & York SP Corp.* (1992), 9 O.R. (3d) 414 (Gen. Div.) and *Pembina Resources Ltd.* v. *Saskenergy Inc*., (1993) Alta. L.R. (3d) 153 (C.A.).

[84] (2003) 35 B.L.R. (3d) 100 (Sup. Ct.) [hereinafter *AMEC*].

[85] AMEC had provided engineering consulting services to Nova for the expansion and upgrading of a chemical plant at Sarnia and the work had been completed in 1998, four-and-one-half years earlier. The parties' contract provided that any liability which AMEC may have had under the contract would expire two years after the date the work was completed. The same contract provided: "Any dispute between the Parties that cannot be resolved by negotiation within 60 days shall be finally settled by arbitration pursuant to the International Chamber of Commerce Rules and procedures for Arbitration."

[86] Sachs J. referred to both the domestic arbitration legislation and the international commercial arbitration legislation despite the fact that, by their provisions, they are mutually exclusive.

could, on its own motion, stay the proceedings and refer the dispute to arbitration.[87] Sachs J. stated:

> "[T]he fact that neither party has clearly asked for a stay does not detract from the fact that this is a case where the parties have agreed to have their disputes dealt with through arbitration and, having reached that agreement, they should be encouraged by the courts 'to hold their course' in that regard, absent legitimate considerations to the contrary.
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> …
>
> Proceeding to arbitration will necessitate some more delay but, taken as a whole, this delay is not a sufficient reason to depart from what I see to be an important principle—that parties who contractually agree to submit their dispute to arbitration should be held to that agreement, rather than being encouraged to separate out certain aspects of their dispute for determination by the courts in separate proceedings."[88]

AMEC's application for a declaration was stayed and the parties were referred to arbitration, something neither of them asked for. Having once agreed their disputes "shall be finally settled by arbitration," the parties were held to their contract, enhancing arbitral, if not party, autonomy.[89]

2. The Use of *Heyman* v. *Darwins Ltd.*[90]

The leading case under the old arbitration statutes in which the granting of a stay was discretionary was *Heyman*, a 1942 decision of the House of Lords. The four-step approach to deciding how to exercise the court's discretion was described in that case as follows:

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[87] She found such authority in s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provided: "A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

[88] *AMEC*, *supra* note 84, at paras. 28, 30.

[89] The parties could have agreed to terminate the arbitrator's mandate under s. 14(1)(b) of the *OAA*.

[90] [1942] A.C. 356, [1942] 1 All E.R. 337 (H.L.) [hereinafter *Heyman* cited to A.C.].

> "Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then [consider] whether the clause is still effective or whether something has happened to render it no longer operative. Finally… [determine] whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."[91]

Oddly enough, *Heyman* is the most often cited precedent in cases considering the mandatory stay provisions in the modern domestic arbitration legislation.[92] Use of *Heyman*, however, implies the old discretion remains.[93]

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[91] *Ibid.* at 370.

[92] *Heyman* is cited, for example, in *AMEC*, *supra* note 84; *Axia Supernet Ltd.* v. *Bell West Inc*., [2003] A.J. No. 283, online: QL (AJ) 2003 ABQB 195 [hereinafter *Axia*]; *Continental Commercial Systems Corp*. v. *Davies Telecheck International, Inc.*, [1995] B.C.J. No. 2440 (S.C.) [hereinafter *Continental*]; *Daigneault Holdings Ltd. (c.o.b. NorSask Aboriginal Consulting Group)* v. *Metis Nation of Sask Secretariate Inc*., [2000] S.J. No. 390 (Q.B.); *Ontario* v. *Abilities Frontier Co-operative Homes Inc.*, (1996), 5 C.P.C. (4th) 81 (Ont. Gen. Div.), leave to appeal refused, [1997] O.J. No. 238 (C.A.), online: QL (OJ) [hereinafter *Abilities Frontier*]; *Thompson General Hospital* v. *CSL Hospital Services Ltd.*, [1996] M.J. No. 495 (Q.B.) [hereinafter *Thompson General Hospital*]. Many other cases merely cite *Abilities Frontier* for the proper approach but in that case, at page 86, Sharpe J. adopted the *Heyman* approach, relying on prior approval for it in *T1T2 Ltd. Partnership* v. *Canada*, [1994] O.R. (3d) 66, (1994), 19 B.L.R. (2d) 72 (Ont. Gen. Div.) [hereinafter *T1T2*]. See *e.g. Durham (Regional Municipality)* v. *Oshawa (City)*, [2003] O.J. No. 776 (Sup. Ct.) and *Mantini* v. *Smith Lyons LLP*, [2003] O.J. No. 1831 (C.A.), online: QL (OJ) at para.17 [hereinafter *Mantini*]. A reference to the approach taken in *T1T2*, as well to that in *Abilities Frontier*, is therefore a reference to the *Heyman* approach to stay applications.

[93] See *e.g. McCulloch* v. *Peat Marwick Thorne* (1991), 124 A.R. 267 (Q.B.). Perras J. found that the approach set out in *Heyman* was reflected in s. 7 of the new Alberta legislation. He refused to grant a stay, despite what he referred to as a "relatively encompassing" arbitration clause in a partnership agreement, because the plaintiff had alleged tortious conspiracy to remove him from an accounting partnership and loss of reputation and these matters were not capable of being the subject of arbitration under the Alberta Act. The decision was criticized by a member of the Alberta Law Reform Institute at a ULCC annual meeting for implying the old discretion remained through the use of stay rules from a decision made long before the new legislation significantly revamped the stay rules. See P.J.M. Lown, "Judicial Interpretation of the Uniform Arbitration Act" in Uniform Law Conference of Canada, *Proceedings of the Seventy-seventh Annual Meeting*, *supra* note 52 at app. K.

There are several challenges to the principle of party autonomy when courts use the *Heyman* approach. Its first step requires the "precise nature of the dispute" be determined. In *B & N Holdings Ltd.* v. *Acrylon Plastics MB (1983) Inc*.,[94] a tenant applied for a stay in order to submit a dispute to arbitration under the terms of a lease and Manitoba's new legislation. Schulman J. referred to a 1990 Manitoba Court of Appeal decision, *Injector Wrap Corp*. v. *Agrico Canada Ltd*.,[95] which was, as Schulman J. noted, a case decided under the old legislation. In *Injector Wrap*, the Court of Appeal had held, relying on *Heyman*, that a litigant who wishes to obtain an order staying an action and referring the issue to arbitration must first file an affidavit showing the precise nature of the dispute between the parties.[96] In *B & N Holdings*, the tenant argued the different requirements of the modern legislation to no avail. Schulman J. concluded:

> "[I]n order for these defendants to succeed on an application for a stay on the ground that the matter should be submitted to arbitration, the defendants must set out in affidavit form the nature of the dispute. The defendants must satisfy this requirement for two reasons. Firstly, as under the former statute, the statute requires that there be a 'matter in dispute,' and the court, on an application of this kind, must go through the steps of ascertaining the nature of the dispute and ascertaining whether the dispute is one which falls within the terms of the arbitration clause. Secondly, under subsection 2(e), the court is required to consider whether 'the matter in dispute is a proper one for default or summary judgment.'"[97]

In contrast to the high level of scrutiny given the nature of the dispute in *B & N Holdings*, other courts appear to simply review claims alleged in the pleadings.[98]

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94 (1999), 135 Man. R. (2d) 95 (Q.B.) [hereinafter *B & N Holdings*].

95 (1990), 67 Man. R. (2d) 158 (C.A.).

96 *Ibid*. at 158-159.

97 *B & N Holdings*, *supra* note 94 at para. 15. Schulman J. went on to find that, based on the very limited information the tenants provided, and despite not having a motion for summary judgment before him, s. 7(2)(e) applied.

98 See *e.g.* the approach of the Ontario Court of Appeal in *Armstrong* v. *Northern Eyes Inc.*, [2001] O.J. No. 1085, online: QL (OJ), 2001 CarswellOnt 1100 (Ont. C.A.) online: eCarswell http://www.ecarswell.com, aff'g (2000), 8 B.L.R. (3d) 46, 133 O.A.C. 366, 48 O.R. (3d) 442, [2000] O.J. No. 1594 (Div. Ct.), online: QL (OJ) [hereinafter *Armstrong*].

The second step in the *Heyman* approach is for the court to determine whether the dispute or disputes fall within the terms of the arbitration clause. One of the most common issues raised in stay applications is whether the parties agreed to arbitrate the disputes before the courts, *i.e*., whether the dispute is covered by the wording of their arbitration agreement.[99] That agreement can be interpreted either narrowly or liberally.

A more liberal approach to interpretation of arbitration clauses is often adopted when the court says nothing about the approach that should be taken to interpreting the legislative stay provisions.[100] In Québec, a liberal approach appears to be tied to the policy change evidenced by the legislature's approval and encouragement of arbitration.[101] Most often, especially in Ontario, a court taking a liberal approach cites *Onex Corp*. v. *Ball Corp*.,[102] a case decided under Ontario's international commercial arbitration legislation. In *Onex*, Blair J. had indicated that courts should not try to put too fine a distinction on nuances between words such as "under," "in relation to," or "in connection with" when interpreting the scope of arbitration clauses. He went on to say:

> "At the very least, where the language of an arbitration clause is capable of bearing two interpretations, and on one of those interpretations fairly provides for arbitration, the courts should lean

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[99] The requirement that the party commencing the court action be a "party to an arbitration agreement" has resulted in arguments resisting stays on the basis the plaintiff or petitioner was not a party to the arbitration agreement, but such arguments are less common than those about the scope of the agreement.

[100] See *e.g*. *Kwan & Kwan Ltd.* v. *Daimler Chrysler Canada Inc*. (2002), 2002 CarswellOnt 792 (Ont. Sup. Ct.) online : eCarswell http://www.ecarswell.com.

[101] See *e.g*. *Condominiums Mont Saint-Sauveur Inc*. c. *Constructions Serge Sauvé Ltée*, [1990] A.Q. No. 2052 (C.A.), online: QL (AQ) [hereinafter *Condominiums*]; *Clavel* c. *Productions Musicales Donald K. Donald Inc*., [1994] A.Q. No. 411 (C.A.), online: QL (AQ) [hereinafter *Clavel*]; *Bridgepoint International (Canada) Inc*. v. *Ericsson Canada Inc*., [2001] Q.J. No. 2470 (Sup. Ct.), online: QL (QJ).

[102] (1994), 12 B.L.R. (2d) 151 (Ont. Gen. Div.) [hereinafter *Onex*]. *Agrifoods International Cooperative Ltd.* v. *Agropur, Coopérative Agro-Alimentaire* (2001), 2001 CarswellOnt 911 (Ont. Sup. Ct.) online: eCarswell http://www.ecarswell.com at para. 26 and *Thompson General Hospital*, *supra* note 92 at para. 20, are two cases which cite *Onex* for this purpose.

> towards honouring that option, given the recent developments in the law in this regard to which I have earlier referred."[103]

Many cases, however, are still quite concerned with the nuanced distinctions between phrases such as "under", "arising out of" or "arising in connection with."[104] *Heyman* figures in these cases too, cited for the finding that the words "arising out of" have a wider meaning than "under."[105] As well, the distinction made in *Heyman* between "limited" or "executory" arbitration clauses and clauses of a "universal" character which are a "general resort to arbitration" remains in use in Ontario.[106]

Deference to arbitration and respect for party autonomy would appear to require a more pragmatic and policy-oriented approach to determining whether a dispute before the court is within the scope of the parties' arbitration agreement. Close attention to the exact words used and how they have been interpreted over the past sixty or seventy years and the categorization of types of clauses as "universal" or "limited" has been disparaged as the "old strict constructionist approach,"[107] more in keeping with judicial scutiny of the boundaries of arbitration.

3. Who Decides Whether the Disputes are Within the Scope of the Arbitration Agreement?

It is true that an arbitration agreement can be drafted as narrowly or broadly as the parties wish, referring all or only certain disputes to arbitration. The real issue, however, is *who* determines whether the dispute

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[103] *Onex*, *ibid*. at 160. One commentator said of this passage from *Onex*, "This statement provides both a refreshing approach to the conflicting authorities on defining the scope of an arbitration clause, and a strong endorsement of party autonomy." See Pepper, *supra* note 45 at para. 37 [footnote omitted].

[104] See *e.g*. *Campney & Murphy* v. *Bernard & Partners*, [2002] F.C.J. No. 1520, online: QL (FCJ), 2002 FCT 1136 (T.D.) (decided under the *BCCAA*); *D.G. Jewelry Inc*. v. *Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (S.C.J.), online: QL (OJ); and *Mantini*, *supra* note 92.

[105] *Heyman*, *supra* note 90 at 356, Porter L.J.

[106] See *e.g. Deluce Holdings*, *supra* note 79 at 150 and *Cityscape Richmond Corp*. v. *Vanbots Construction Corp*. (2001), [2001] O.J. No. 638, online: QL (OJ), 8 C.L.R. (3d) 196, 2001 CarswellOnt 517 (Ont. Sup. Ct.) online: eCarswell http://www.ecarswell.com at para. 21.

[107] Branson, *supra* note 42 at 52.

before the court is within the scope of the arbitration agreement. All of the modern domestic arbitration legislation provides that an arbitrator may rule on his own jurisdiction to conduct the arbitration—the *Competence de la Competence* principle.[108] They all state that in doing so, the arbitrator may rule on objections to the existence or validity of the arbitration agreement. They also all provide that, if the arbitration agreement is a clause in another agreement, an arbitration clause is to be treated as an independent agreement for the purposes of ruling on jurisdiction and may survive even if the main agreement is found to be invalid.[109] Despite the existence of the last mentioned provision in the Ontario, Alberta and Manitoba domestic legislation, some courts in those provinces rely on *Heyman* for the independence of the arbitration clause principle[110] and not the statutory provision.

The difference in approaches to the question of who decides whether the disputes before the courts are within the scope of the arbitration clause can be illustrated by contrasting two cases from British Columbia. Deference to the arbitrator's authority to decide his own jurisdiction is evident in *Swanson* v. *Mitchell Bay Properties Ltd.*,[111] a case in which the sole issue was whether all of the plaintiff's claims were within the scope of the arbitration clause. That case is one of the very few British Columbia cases to take note of section 22(1) of the *BCCAA*. Shabbits J. noted that section 22(1) states that unless the parties otherwise agreed the rules of the *BCCAA* for the conduct of domestic commercial arbitrations applied. Rule 20(1) of that arbitral organization stated the arbitral tribunal may rule on its own jurisdiction,

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[108] See *AAA*, *supra* note 4, s. 17(1); *OAA*, *supra* note 5, s. 17(1); *SAA*, *supra* note 6, s. 18; *MAA*, *supra* note 8, s. 17; *NSCAA*, *supra* note 9, s. 19; *NCAA*, *supra* note 7, s. 17. The *BCCAA* provision is different. S. 22(1) merely states that the rules for domestic commercial arbitrations of the British Columbia International Commercial Arbitration Centre (the *BCICAC*) apply unless the parties otherwise agree. Those incorporated rules include the *Competence de la Competence* principle.

[109] See *AAA*, *ibid*., s. 17(3); *SAA*, *ibid*., s. 18(3); *OAA*, *ibid*., s. 17(2); *MAA*, *ibid*., s. 17(3); *NSCAA*, *ibid*., s. 19(3); *NCAA*, *ibid*., s. 17(3). Again the *BCCAA* merely provides in s. 22(1) that the domestic commercial arbitration rules of the *BCICAC* are applicable unless the parties otherwise agree and those rules include the independence of the arbitration clause provision.

[110] For reliance on *Heyman*, *supra* note 90, see *e.g*. *Axia*, *supra* note 92; *B & N Holdings*, *supra* note 94; *Thompson General Hospital*, *supra* note 92.

[111] 2002 BCSC 1434, 2002 CarswellBC 2485 (B.C.S.C.) online: eCarswell http://www.ecarswell.com.

including on any objection with respect to the existence or validity of the arbitration agreement. The court deferred to the arbitrator's authority in the first instance.[112]

That deferential approach can be contrasted with the judicial scrutiny brought to bear on the same issue in *Maher* v. *Morelli Chertkow*.[113] A former partner commenced an action against the law firm he was forced to leave and the firm applied for a stay based on the partnership agreement's arbitration clause. Maher opposed the application on the basis there was an issue as to whether the partnership agreement was valid and binding and argued that where there is that type of issue, it cannot go to the arbitrator because it effectively requires the arbitrator to decide an issue outside his jurisdiction. Maher relied on *Heyman* which, among other things, held that where there is a dispute as to whether there has ever been a binding contract between the parties, such a dispute cannot be within the scope of an arbitration clause in the challenged contract. Williams J. held:

> "In my view, that issue (whether a party is bound by the arbitration clause) *will be resolved by the court*, in the context of an application such as the present one, assuming sufficient evidence exists to enable a finding to be made. I take this from a plain reading of section 15 of the Commercial Arbitration Act ...
>
> For one party to simply contend that it does not consider itself bound by the arbitration clause cannot, standing alone, entitle that party to avoid the application of the clause. As I read subsection (2), *the Court is mandated to determine* whether the arbitration agreement (here, incorporated into the Partnership Agreement) is 'void, inoperative or incapable of being performed', or, alternatively, whether it is valid and in force."[114]

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[112] *Clavel*, *supra* note 101, is another example of deference to the arbitrator's authority to decide his own jurisdiction. The court acknowledged the dispute before the court was not an ordinary kind of dispute under the parties' contract because it involved the deliberate and gratuitous sabotage of a rock concert. Nevertheless, the court held that because arbitrators had the power to decide their own competence under art. 943 C.C.P., subject to possible review by the court, it was up to the arbitrators to decide, in the first instance, whether the arbitration clause covered this dispute.

[113] (2003), 2003 CarswellBC 35 (B.C.S.C.) online: eCarswell http://www.ecarswell.com. There is no mention in this case that the parties had chosen any particular arbitration rules.

[114] *Maher*, *ibid*. at para. 16 [emphasis added].

There is also said to be a "somewhat disturbing trend",[115] adverse to party autonomy, in cases relying upon statements of Blair J. in *Deluce Holdings Inc.* v. *Air Canada*.[116] That case considered the interplay of the parties' shareholder agreement, which included an arbitration clause, with the oppression remedy provisions of the *Canada Business Corporations Act*. Blair J. held that the real subject matter of the dispute was not the fair market value of the shares but one which "strikes at the very underpinning of the contractual mechanism itself."[117] In staying the arbitration proceedings, he stated that "[t]he question is whether that oppression is such that it destroys the very underpinning of the arbitration structure, thus taking the subject of the dispute out of the 'matters to be submitted to arbitration under the agreement.'"[118] The case is critiqued, however, for the court's usurpation of the arbitration panel's authority to rule on its own jurisdiction.[119] In addition, the reasoning in *Deluce Holdings* is seen as an invitation to narrowly construe the ambit of arbitration clauses and to find rather too easily that the conduct under consideration "destroys the very underpinning of the arbitration structure."[120]

4. Reasons to Refuse a Stay of Court Proceedings

The modern domestic arbitration legislation in all but British Columbia lists five reasons the court may refuse a stay even if the arbitration agreement covers the disputes before the court.[121] Only one of those five is frequently an issue, the ground that the arbitration agreement is invalid. In British

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[115] Pepper, *supra* note 45 at para. 48.

[116] *Supra* note 79.

[117] *Ibid.* at 150.

[118] *Ibid.* at 149.

[119] Pepper, *supra* note 45 at para. 50.

[120] *Ibid*. at para. 51. Cases that rely on *Deluce Holdings*, *supra* note 79, for this point include *Jaffasweet Juices Ltd.* v. *Michael J. Firestone & Associates* (1996), 45 C.P.C. (3d) 350 (Ont. Gen. Div.) and *Kightley* v. *Beneteau*, [1999] O.J. No. 1892 (Sup. Ct.), online: QL (OJ) [hereinafter *Kightley*].

[121] The five grounds are: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under the relevant province's law; (4) the motion was brought with undue delay; and (5) the matter is a proper one for default or summary judgment.

Columbia, where the legislation is less specific and more Model Law-like on this point, similar issues are raised because the court is required to refer the parties to arbitration unless it finds the arbitration agreement is null and void, inoperative, or incapable of being performed.[122]

In dealing with arguments alleging the arbitration agreement is invalid and a stay should therefore be refused, some courts ignore the provision stating that the arbitration clause in a main agreement shall be considered a separate contract for the purposes of determining the arbitrator's jurisdiction and may survive even if the main agreement is found to be invalid.[123] Other courts ignore the fact that it is invalidity of the arbitration agreement, not the main agreement, that is listed as a reason to refuse a stay. For example, in the context of a wrongful dismissal suit in which the employer attempted to invoke an arbitration clause, Caswell J. in *Novak* v. *Rodak*,[124] while acknowledging that the arbitration clause was very broad, declined to exercise what she called her "discretion" to stay on the ground that the validity of the main agreement was in issue. Why the validity of the main agreement was relevant to the validity of the arbitration clause in that main agreement was not discussed. Neither was the source of the court's discretion.

Part of the problem in cases such as *Novak* appears to stem from *Heyman* again and also older Supreme Court of Canada cases, such as *Stokes-Stephens Oil Co.* v. *McNaught*,[125] which adopted the principle that "if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void."[126]

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[122] See s. 15(2) *BCCAA* in Appendix A, below.

[123] See *e.g. G.* v. *G.* (2000), 79 Alta. L.R. (3d) 153, [2000] 7 W.W.R. 363 (Q.B.) at para. 19.

[124] [1999] O.J. No. 4996 (Ont. Sup. Ct.), online: QL (OJ) [hereinafter *Novak*]. *Wat-Char Holdings Ltd.* v. *Deltram Corp.*, [1999] O.J. No. 109 (Ont. Gen. Div.), online: QL (OJ) is a very similar case in which the court also declined to exercise its "discretion" to stay legal proceedings.

[125] (1918), 57 S.C.R. 549, 44 D.L.R. 682, [1918] 2 W.W.R. 22 (S.C.C.) [hereinafter *McNaught* cited to S.C.R.].

[126] *Ibid*. at 559.

These old authorities were considered in *Armstrong* v. *Northern Eyes Inc*.,[127] which concluded that reliance upon them was questionable due to the clear shift in policy in the legislation governing arbitration. Pitt J. refused to follow the older authorities, stating:

> "Presumably, parties seeking a stay to pursue arbitration will not acknowledge invalidity. There are, therefore, two possible ways to interpret section 7(2)2 of the Arbitration Act. Either it applies wherever the party resisting arbitration argues for invalidity, or where the court makes *a prima facie determination that invalidity is a serious issue*. In my view, the latter is the more reasonable interpretation, as the former would mean a mere allegation of invalidity would doom any attempt to invoke an arbitration clause in all cases, even where it is quite clear that is what the parties wanted when they made the agreement."[128]

In the above passage, Pitt J. suggested, as a way to approach section 7(2) in which the invalidity of the arbitration agreement is a reason to refuse a stay, that the court make a "prima facie determination" that the alleged invalidity is a "serious issue". However, the agreement which was alleged to be invalid in *MG Canada* was the main agreement in which the arbitration clause was contained. What of the independence of the arbitration clause and the possibility it might survive any invalidity of the main agreement?

A more deferential attitude to party autonomy and a more deferential approach to arbitration acknowledges that the validity of the arbitration agreement can be attacked only if the grounds for attack specifically affect that part of the agreement and not just the contract in general.[129] In a less deferential approach, doctrines such as fraud, unconscionability and duress which are alleged to affect the main agreement have been invoked as grounds for a court to refuse a stay.[130]

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[127] (2000), 8 B.L.R. (3d) 46 (Ont. Div. Ct.). See also *MG Canada Ltd.* v. *Melitta Canada Inc.* (2001), 11 C.P.C. (5th) 391, 18 B.L.R. (3d) 78 (Ont. S.C.J.) [hereinafter *MG Canada*].

[128] *MG Canada*, *ibid.* at para. 18 [emphasis added].

[129] *New Zealand Law Commission*, *supra* note 26 at 140.

[130] Unconscionability is the most common basis for allegations that the arbitration agreement itself is invalid. It has been raised several times in the franchise context but as most franchisors are American corporations the governing statutes are usually the ICA Acts. In such cases, many of the reasons for staying Canadian court actions in favour of

5. Partial Stays

In all of the new domestic arbitration legislation except that of British Columbia, the provision governing stays contains a subsection providing that the court *may* stay those matters in dispute before it which are dealt with in the arbitration agreement and allow the court action to continue with respect to the other matters.[131] In the exercise of this discretion, a court must find that the arbitration agreement deals only with some of the matters in dispute and that "it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters." The mere existence of this subsection causes some problems. One of its preconditions is that the court must find the arbitration agreement deals with only some of the matters in dispute and not others. It seems to demand the kind of close scrutiny called for in the *Heyman* approach and appears hostile to an arbitrator's being able to determine his own jurisdiction.

One specific issue that has arisen is whether the court has discretion to refuse a stay altogether and allow the entire court proceeding to continue if a partial stay is not reasonable or whether the only alternative is for a court to grant a complete stay of the court proceedings, given the section's introductory and mandatory "shall stay" requirement. As Stewart J. in *MacKay* v. *Applied Microelectronics Inc*.[132] noted, there is case law adopting both interpretations.[133] Staying the entire court proceeding when a severing of causes of action is not "reasonable" is more deferential to the autonomy of the arbitral process. Referring none of the issues to arbitration, even though some of them are covered by the parties' arbitration agreement, is usually

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arbitration in the United States rely on the Canadian franchisees not being vulnerable consumers and on American cases considering the same issues and the same franchise agreements. See *e.g*. *Ellis* v. *Subway Franchise Systems of Canada Ltd.* (2000), 8 B.L.R. (3d) 55, 2000 CarswellOnt 1659 (Ont. Sup. Ct.) online: eCarswell http://www.ecarswell.com; *Continental*, *supra* note 92; *Petrolon Distribution Inc* v. *Petro-Lon Canada Ltd.* (1995), 19 B.L.R. (2d) 123 at 135 (Ont. Gen. Div.); *D.L.T. Holdings Inc.* v. *Grow Biz International, Inc*., [2001] P.E.I.J. No. 29 (S.C. (T.D.)), online: QL (PEIJ).

[131] See *AAA*, *supra* note 4, s. 7(5); *OAA*, *supra* note 5, s. 7(5); *SAA*, *supra* note 6, s. 8(5); *MAA*, *supra* note 8, s. 7(5); *NSCAA*, *supra* note 9, s. 9(5); *NCAA*, *supra* note 7, s. 7(5). See Appendix A, below for the wording of the statutes.

[132] [2001] N.S.J. No. 342 (S.C.), online: QL (NSJ).

[133] See *Rosedale Motors Inc*. v. *Petro-Canada Inc*., [2001] O.J. No. 5368 (Div. Ct.), rev'g (1998), 42 O.R. (3d) 776 (Gen. Div.); *Hammer Pizza Ltd.* v. *Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Q.B.), online: QL (AJ); *Kightley*, *supra* note 120.

done in the name of the inefficiency of multiple proceedings and the possibility of inconsistent results from the two different forums.[134]

IV. THE CONSUMERIZATION OF ARBITRATION AND THE NORM OF PARTY AUTONOMY

In 1997, one American commentator noted that the era of "consumerized arbitration" had arrived in the United States:

> "A sampling of judicial opinion and published commentary revealed mounting preoccupation with the use of arbitration in contracts involving employees, investors, franchisees, consumers of medical care and a host of other goods and services. On this broad front lie unprecedented challenges and perils for consensual conflict resolution. In contrast to the historical roots of commercial arbitration, members of the public were finding themselves steered into a process about which they knew little by virtue of boilerplate in a mass-produced contract presented by employers or businesses."[135]

A variety of consumer groups in the United States have made arbitration a major issue. They allege mandatory arbitration clauses are used to deny millions of Americans their right to sue in court; that they undermine consumer protections designed to level the playing field between big business and individuals; that private arbitration is much more expensive than going to court;[136] that mandatory arbitration clauses are used to defeat class actions; and that a pro-business bias is built into the arbitration

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[134] See *e.g. Angelo Breda Limited* v. *Guizzetti*, [1995] O.J. No. 3250 (Gen. Div.), online: QL (OJ) and *Self* v. *Abridean Inc*., [2001] N.S.J. No. 493, online: QL (NSJ), 2001 NSSC 191. See also the discussion of these issues in the context of conflicts and choice of law in the paper by C.A. Kent collected in these Conference proceedings.

[135] T.J. Stipanowich, "The Growing Debate Over 'Consumerized' Arbitration: Adding Cole to the Fire" *Dispute Resolution Magazine* 3:4 (Summer 1997) 20.

[136] One of the main problems in many of the American cases was the adoption of the rules of the American Arbitration Association (AAA) in arbitration clauses. Those rules required the initiating party to pay the filing fee and the costs were prohibitive for many consumers, sometimes $1,500 or $2,000. The AAA recently announced it would cap consumer arbitration costs at $375 for cases involving less than $75,000 and require the business to pay the remainder. It also announced it would no longer enforce pre-dispute arbitration clauses in health insurance contracts.

system.[137] Arbitration in the consumer context has even been an election issue in the United States.[138]

Arbitration in the employment arena has attracted special criticism in the United States, where pre-dispute agreements to arbitrate employment disputes of all types, including allegations of discrimination and sexual harassment, became a common condition of non-unionized employment in the 1990s.[139] Arbitration, and especially mandatory, pre-dispute agreements to arbitrate are said to be unlawfully coercive and a form of second-class justice.[140] Even the National Academy of Arbitrators announced its opposition to such practices.[141] Some courts refused to uphold such agreements on the basis that employees' waivers of a judicial forum for claims such as sexual harassment and sex discrimination were not knowing or voluntary,[142] but most lower courts upheld such agreements.

Bearing in mind that changes in judicial attitude in favour of party autonomy in arbitration began ten to fifteen years earlier in the United States than in Canada, is there any indication that these types of concerns will be

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[137] State Action, http://www.cfpa.org/issues/mandatoryarbitration/index.cfm (date accessed: August 18, 2003)

[138] In the last state-wide election in Alabama, visible and plentiful placards promoted or derided arbitration, proclaiming such slogans as "Arbitration is a license to steal" or "Trial lawyers win—enough said." See F.M. Haston, III, "Arbitration in Alabama: Of Road Signs and Reality" *Ala. Law*. 62 (January 2001) 63; M.C. McDonald & K.E. Reid, "Arbitration Opponents Barking up the Wrong Branch" *Ala. Law*. 62 (January 2001) 56 56; T.J. Methvin, "Alabama—The Arbitration State" *Ala. Law*. 62 (January 2001) 48; M.B. Hutchens, "At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama" (2002) 53 Ala. L. Rev. 599. The issues that had arisen in the consumer context—the reasons why arbitration was an election issue—included unconscionability, mutuality, post-contract notification, fraud as a defence, non-signatory challenges, the effects on class actions, and arbitration's applicability in product warranty cases. Interestingly enough, pre-dispute arbitration clauses in consumer contracts are illegal *per se* in Alabama. In addition, consumers have to waive their Seventh Amendment rights to a jury trial when they sign an arbitration provision.

[139] See Gorman, "The *Gilmer* Decision and the Private Arbitration of Public Law Disputes" (1995) U. Ill. L. Rev. 635 and Hoffman, "Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?" (1996) 17 Berkeley J. Emp. & Lab. Law 131.

[140] See *e.g*. R. Alleyne, "Statutory and Discriminatory Claims: Rights 'Waived' and Lost in the Arbitration Forum" (1996) 13 Hofstra Labor Law Journal 381.

[141] Stipanowich, *supra* note 135.

[142] See *e.g*. *Prudential Ins. Co. of America* v. *Lai*, 42 F.3d 1299 (9th Cir. 1994).

coming before Canadian courts in the near future? The issue of the enforcement of arbitration clauses in pre-employment contracts has recently arisen in this country, as has the use of arbitration agreements as risk management tools to avoid class actions. Based on the American experience, these few cases may well be just the beginning.

In *Huras* v. *Primerica Financial Services Ltd*.,[143] potential employees of the defendant were required to undergo training without pay prior to commencing employment, contrary to the British Columbia *Employment Standards Act*. The defendant applied for a stay of the class proceedings on the basis of an arbitration provision in the employment agreements. The defendant's application was dismissed on the ground that the employment contracts were entered into only when the employees began full-time employment, after the "no pay" training. That timing point was the only point on which the judgment of Cumming J. in Chambers was upheld by the Court of Appeal. It is, however, the comments of Cumming J. on the strictly *obiter* matters of exclusion of mandatory law and unconscionability that are of more interest in connection with the norm of party autonomy:

> "Very few, if any, of the putative class members would even consider proceeding to an arbitration of a dispute with Primerica given the cost of paying for one's own arbitrator in the first instance and the risk of substantial costs in the event of failure. The arbitration clause mandates a three-person arbitration panel. There are cost sanctions if the plaintiff is unsuccessful at arbitration.
>
> Two of the *normative purposes* of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek an arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove

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[143] *Huras* v. *Primerica Financial Services Ltd*., [2000] O.J. No. 1474, online: QL (OJ), [2000] O.T.C. 533, (2000) 13 C.P.C. (5th) 114 (Sup. Ct.), aff'd (2000), 137 O.A.C. 79 (C.A.) [hereinafter *Huras*].

> inconvenient or more costly to the plaintiff and similarly-situated persons.
>
> I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent, any resolution of a dispute *other than upon the terms dictated by Primerica.* The existence of the arbitration clause is *unfair*. It would be perverse and *in conflict with the normative purposes* of an arbitration clause to enforce the one at hand."[144]

Although explicitly neither approved of nor disapproved of by the Court of Appeal, these comments suggest a deeper look at the principle of party autonomy.

However, the more recent case of *Kanitz* v. *Rogers Cable Inc*.[145] takes a very different approach. *Kanitz*, decided in 2002, is the first Canadian case to deal with the issue of whether the right to pursue a class action can be contracted away in an arbitration agreement. In that case the answer was "yes" and class proceedings were stayed because of the arbitration clause.

The arbitration clause in that case arose in rather unusual circumstances. The plaintiffs in the proposed class action were former subscribers to the defendant's high-speed Internet access service. The user agreement between the defendant and subscribers provided that the defendant could amend that agreement any time by posting notice of such changes on its web site. Continued use of the service following notice meant that the subscriber agreed to the changes. The defendant amended the user agreement to add an arbitration clause and a waiver of the right to commence or participate in a class action against the defendant and then posted the amendment on its web site. Nordheimer J. held that the terms of the amending provision in the original user's agreement placed a duty on users to check the web site to determine if any changes had been made. Applying *Rudder* v. *Microsoft Corp*.,[146] he held that reviewing five screens to get to the user agreement and

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[144] *Ibid*. at paras. 42-44 [emphasis added].

[145] [2002] O.J. No. 665, online: QL (OJ), [2002] O.T.C. 143, (2002) 21 B.L.R. (3d) 104, (2002) 16 C.P.C. (5th) 84, (2002) 58 O.R. (3d) 299 (Sup. Ct.) [hereinafter *Kanitz*].

[146] [1999] O.J. No. 3778, online: QL (OJ), (1999) 106 O.T.C. 381, (1999) 47 C.C.L.T. (2d) 168, (1999) 40 C.P.C. (4th) 394, (1999) 2 C.P.R. (4th) 474 [hereinafter *Rudder*]. *Rudder* was a choice of forum and choice of law case, and not an arbitration case, but it also involved an application for a stay of intended class proceedings. Microsoft based its stay

then scrolling down the user agreement to find the separate arbitration clause with its own heading does not mean the amendment is "buried" and does not make the amendment analogous to the fine print on the back of rent-a-car agreements. Nordheimer J. therefore found there was an arbitration agreement. As a result, he held there was a mandatory stay of any action under section 7(1) of the *OAA* unless one of the exceptions in section 7(2) was applicable.

The plaintiffs argued the arbitration agreement was invalid and its subject-matter was not arbitrable. They argued it was invalid because it was unconscionable, relying on the lower court's decision in *Huras*. Nordheimer J. dealt with this argument by first discussing the standard to be applied in deciding whether any of the exceptions applied. He adopted the conclusions of Hart J. in the Alberta decision of *G*. v. *G*.,[147] saying the mere suggestion of invalidity was not enough because "it would effectively negate the clear legislative intent to promote arbitral autonomy."[148] He acknowledged there clearly was an inequality of bargaining power between a single consumer and a corporation the size of Rogers. As he also noted, in reality there was no bargaining at all; it was a "take it or leave it" form of contract.[149] However, he rejected the argument that the mere imposition of a clause mandating arbitration and waiving rights to class actions was evidence that Rogers took advantage of its superior bargaining power. Neither did he find the clause analogous to the one in *Huras*. The plaintiffs had argued the prohibition

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application on an alleged agreement that the courts in King County in Washington would have exclusive jurisdiction. In analyzing how to approach forum selection clauses, Winkler J. drew on *Sarabia* v. *Oceanic Mindoro (The)* (1996), 4 C.P.C. (4th) 11 at 20 (B.C.C.A.), leave to appeal denied [1997] S.C.C.A. No. 69, online: QL (SCCA) where Huddart J. adopted the view that forum selection clauses should be treated with the same deference as arbitration agreements, stating they were "fundamentally similar." The plaintiffs in *Rudder* had attacked the agreement on the basis of its form, and in particular argued that the necessity to scroll down the Member's Agreement to find the choice of forum clause made it analogous to "fine print" in hard copy contracts. Winkler J. rejected the analogy to "fine print", holding that giving effect to this argument "would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium", *Rudder*, *ibid.* at para. 16.

147 *G.* v. *G*., *supra* note 123.

148 *Ibid*. at para. 25, cited in *Kanitz*, *supra* note 145 at para. 35.

149 *Kanitz*, *supra* note 145 at para. 38.

against class actions defeated the public policy behind the *Class Proceedings Act, 1992*,[150] and was for that reason unconscionable.

Class action legislation is generally seen as having three underlying policy objectives: first, there is a goal of facilitating access to justice for claimants of relatively small amounts of money; second, the legislation seeks to achieve cost efficiencies and economies in the use of resources by providing that common issues be litigated in a single proceeding involving many claimants; and, third, by facilitating access to justice, the legislation is said to act as a mode of regulating business conduct.[151] The public policy argument was rejected on the basis the Ontario courts had always held that statute was a procedural statute, not a substantive statute, whereas the arbitration clause in *Huras* was characterized as one denying the plaintiffs' mandatory legal rights.

Like Cumming J. in *Huras*, the court in *Kanitz* addressed the issue of whether the arbitration clause was, in effect, a waiver of remedy because no customer would pursue arbitration for the amount involved. On this point, the court adopted observations made by Chief Justice Rehnquist of the United States Supreme Court in *Green Tree Financial Corp.-Alabama* v. *Randolph*.[152] Instead of acknowledging that few of the potential class members would even consider proceeding to arbitration due to the cost of paying for their "judges", as Cumming J. did in *Huras*, the deciding factor in *Kanitz* was that there was no evidence on the record that any one customer was put off from arbitrating due to cost and no evidence of the cost of arbitration.

Most Canadian provinces today have legislation facilitating class proceedings.[153] Even in those provinces without specific statutes, class

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[150] *Class Proceedings Act*, *1992*, S.O. 1992, c. 6.

[151] See *Western Canadian Shopping Centres Inc*. v. *Dutton*, [2001] 2 S.C.R. 534 [hereinafter *Dutton*]. See also *Huras*, *supra* note 143 at para. 45.

[152] 531 U.S. 79 (2000) at 90-91. The *Green Tree Financial Corp.–Alabama* case figured prominently in making arbitration an election issue in Alabama recently. See *supra* note 128.

[153] See the *Class Proceedings Act*, *1992*, *supra* note 150; *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Proceedings Act*, C.C.S.M. c. C130; *Newfoundland and Labrador Class Actions Act*, S.N.L. 2001, c. 18.1; C.C.P., Book IX and *Act Respecting the Class Action*, R.S.Q., c. R-2.1; *Class Actions Act*, S.S. 2001, c. 12.01; and the *Federal Court Rules*, as am. by Rules Amending the Federal Court Rules, 1998, SOR/2002-417, s. 17.

proceedings are now available under the traditional representative rule as a result of the Supreme Court of Canada decision in *Western Canadian Shopping Centres Inc*. v. *Dutton*.[154] The reasoning in both *Huras* and *Kanitz* therefore has wide applicability, as evidenced in part by the dismay with which the result in the *Dutton* case has been greeted in some circles. According to one oil and gas lawyer, it means that "plaintiffs are now granted access to the Courts with claims which, if taken on an individual basis, would be uneconomic."[155] Defendants do not welcome legislative or judicial facilitation of class actions, especially if plaintiffs have small claims that are not viable if pursued individually.[156]

Reaction to *Kanitz* in those same circles has, on the other hand, been much more positive. A number of the larger corporate commercial law firms in Canada have begun to tout the benefits of arbitration agreements as "class action risk management tools."[157] The Co-Chair of Macleod Dixon's Class Action Practice Group, for example, concluded a brief article summarizing the *Kanitz* decision with the following advice on managing corporate exposure to class proceedings:

> "While the decision in [*Kanitz*] may be distinguished on a variety of grounds, business enterprises who contract with numerous customers using standard form agreements would be well advised to take a hard look at using arbitration clauses as part of their risk management strategy."[158]

Alberta introduced a *Class Proceedings Act*, S.A. 2003, c. C-16.5 [Bill 25, 2003], and it received Royal Assent on May 16, 2003 but was not yet proclaimed by June 2003.

154 *Supra* note 151.

155 D. McGrath, "Avoiding Class Actions in the Oil & Gas Industry", available at Blake Cassels & Graydon LLP, http://www.blakes.com/english/publications/bog/bogjulaug02_class actions.asp.

156 W.K. Branch, *Class Actions in Canada* (Aurora: Canada Law Book, 2003) at 6-4, 6.200.

157 See *e.g*. A.D. Borrell, "Arbitration and Choice of Law Provisions as Class Actions Risk Management Tools" (Vancouver 2002) (published on the web site of Fasken Martineau DuMoulin LLP at http://www.fasken.com, Information Resources, Publications, Class Actions); S.K. Leiti, "Ontario Court Forces Proposed Class Action Plaintiffs to Arbitrate Claims" in *Vantage: Class Actions Newsflash*, Macleod Dixon LLP, Fall 2002; McGrath, *supra* note 155.

158 Leiti, *ibid*.

Dalton McGrath of Blake, Cassels & Graydon was even more explicit when he advised that:

> "[a]lthough many factors are considered by the Court in determining whether to certify a class action, the use of an arbitration clause may provide a simple and expedient method of defending expensive and time-consuming class action proceedings which may otherwise arise from the many standard form contracts executed routinely in the oil and gas industry."[159]

Other jurisdictions which have modeled their reformed arbitration legislation on the Model Law have incorporated consumer protection into their new legislation. They did so in the name of party autonomy. For example, the New Zealand Law Commission's 1991 draft domestic arbitration legislation states that when a consumer enters into a contract which contains an arbitration clause, the arbitration clause is enforceable against the consumer only if the consumer, in a separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.[160] It also provides that non-compliance means the arbitration agreement shall be treated as "inoperative" in the words of the Model Law. The Law Commission defended this special treatment for consumer arbitration agreements on the basis of the Contractual Theory:

> "Our approach to arbitration is premised on a recognition of its contractual nature. The general law of contracts assumes that parties who have voluntarily undertaken obligations as part of a bargain or agreement should be held to those obligations or pay damages should

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[159] McGrath, *supra* note 155.

[160] *New Zealand Law Commission*, *supra* note 26 at 139-146. The *Consumer Arbitration Agreements Act 1988* (UK) provides that arbitration cannot be enforced against a consumer unless the consumer gives written consent after the dispute has arisen, or submitted to the arbitration, or where a court makes an order that it is not detrimental to the interest of the consumer for the dispute to be referred to arbitration having regard to, in particular, the availability of legal aid and the expense which may be involved in arbitration. See G.G. Howells, "The Consumer Arbitration Agreements Act 1988" *Company Lawyer* 10 (1989) 20, who argues,

> "[t]he objection is to small print clauses which make arbitration a compulsory alternative to the courts. The average consumer is unlikely to read these clauses, if he does read then will probably not understand them and even if he does object to the clause he is unlikely to be able to buy the goods or services without accepting the clause."

> they breach them. The assumption accords with reality and expectations in the case of a transaction between two business parties but is often criticized as inappropriate for consumer transactions. The topics of inequality of bargaining power, standard form contracts (also known as contracts of adhesion), and the absence of true consent remain contentious and the subject of divided opinions within the ranks of policy makers and legal commentators and academics."[161]

Even if Canadian courts do adopt the principle of party autonomy in the domestic arbitration context, the basis of that principle in the Contractual Theory raises thorny issues about what deference to party autonomy may actually require from the courts. This is especially true in the pre-employment arbitration agreement context where the party with less economic power may be denied the protection of mandatory laws when the arbitration agreement is accompanied by choice of forum and choice of laws provisions. It is also especially true in the class action context where the cost of arbitration may deny access to justice in any forum.[162]

CONCLUSION

Canadian courts are not yet to the point of the American courts' acceptance of arbitration. Nor has the backlash to the consumerization of

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[161] *New Zealand Law Commission*, *supra* note 26 at 140.

[162] According to information posted on the relevant organizations web sites in August 2003:

- at the BCICAC (http://www.bcicac.com/), the non-refundable fee for commercial arbitration is $500 plus GST for claims up to $50,000 and $1,500 plus GST for claims over that amount. In addition, there is an administrative fee of $150 per party. The hourly rate of the arbitrator(s) is set by the arbitrator.
- at the CACNIQ (http://www.cacniq.org/en/), the online arbitration fee for claims less than $100,000 is $500; the arbitrator's fees are not included in that amount.
- at ADR Chambers, there is an administrative fee of $500 per party and a deposit of $3,000 is required for each day of arbitration that is booked. For the ADR Chambers in Ontario and Québec, the arbitrator's hourly rate is set at $450; in western Canada at $400 per hour; and in the Atlantic provinces, $350 per hour.
- at the ADR Centre (http://www.amic.org/), in BC and Alberta, the fee is $1,200 for a 4 hour, 2 party arbitration, inclusive of the arbitrator and the facilities, and there is also an administration fee of $250 per file.

arbitration and the privatization of law and judging begun here yet, as it has there. There are, however, indications both are beginning to happen.

Arbitration begins with and depends upon an agreement between the parties to submit their disputes to arbitration. It is based on voluntariness, and voluntariness on the part of both parties. There is little concern that arbitration is voluntary in a genuine sense in the context of commercial arbitrations between business concerns that enter into arbitration agreements knowingly and with legal advice. But the situation may be quite different when the arbitration clause is "boilerplate" in a lease, an installment sales contract, or another document where the parties' bargaining power may not be even roughly equal. Are arbitration clauses in contracts of insurance, employment, franchisee agreements, and leases really bargained for or are they offered on a take-it-or-leave-it basis to captive insureds, employees, franchisees and tenants?

If the justification for arbitration is indeed party autonomy, then more attention has to be paid to the Contractual Theory underlying it. That explanation for arbitration relies upon the parties voluntarily agreeing to submit their disputes to arbitration, to appoint the arbitrator and, to accept the arbitral tribunal's award as having binding force. If there is no agreement, if the terms are dictated by the commercial party with more resources, then it is not voluntary. The statutory reforms in New Zealand and the United Kingdom recognize this, even if they do not really address the "take it or leave it" contract offered by corporations such as Rogers, Primerica Financial Services and Microsoft. There is, however, no indication of consumer-oriented changes to the modern domestic arbitration legislation in Canada.

The question I predict will be increasingly confronting Canadian courts is whether or not it is for the state to determine if, and to what extent, some parties should be able to order their private relations. If it is not a matter for Canadian courts and legislatures, then it is a matter of private law-making and an abdication of decision-making authority to those with greater market power.

Appendix A

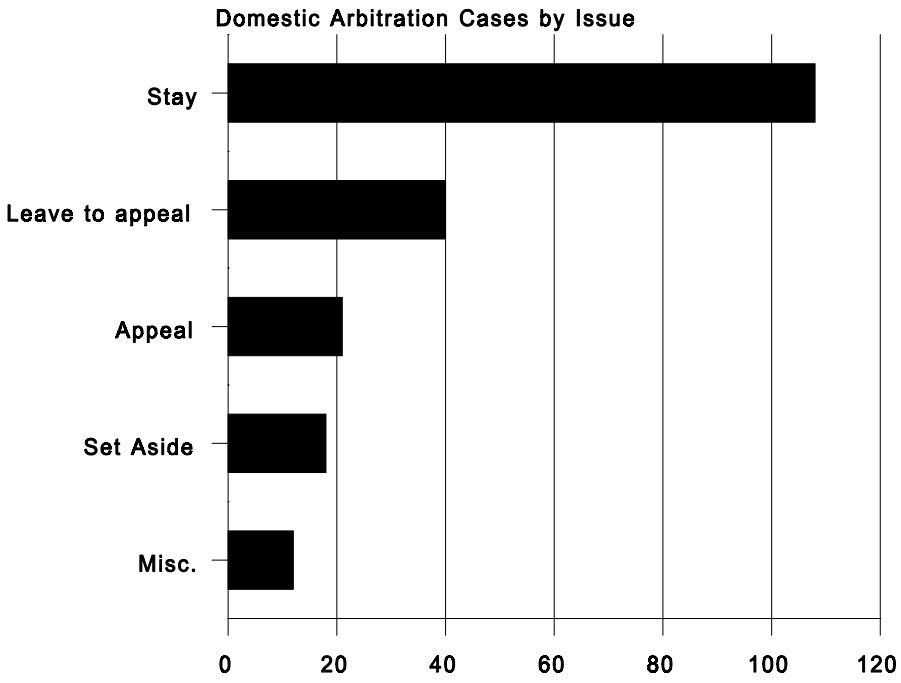
	BC Commercial Arbitration Act	**Alberta Arbitration Act** *(and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted)*	**Ontario Arbitration Act, 1991**	**Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)**
No court intervention	32. Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.	6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act: (a) to assist the arbitration process; (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement; (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement; (d) to enforce awards. (S. 7 SAA; s. 6 MAA; s. 8 NSCAA) NBAA s. 6: No court shall intervene in matters governed by this Act, except as this Act provides.	6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act: 1. To assist the conducting of arbitrations. 2. To ensure that arbitrations are conducted in accordance with arbitration agreements. 3. To prevent unequal or unfair treatment of parties to arbitration agreements. 4. To enforce awards.	940.3 C.C.P. states the occasions for and scope of judicial intervention are limited to those expressly authorized by the procedural code.

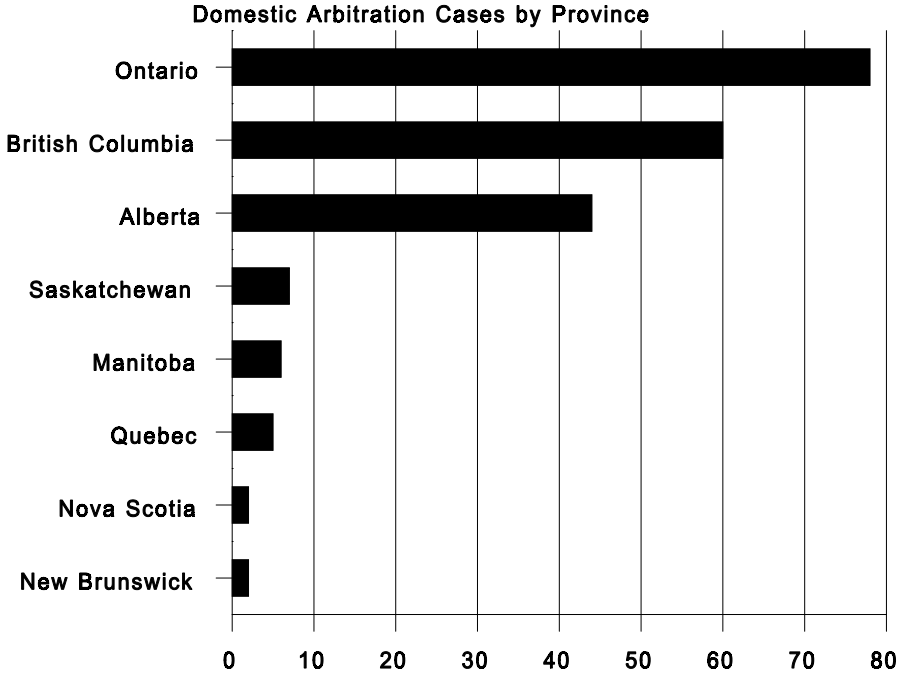
	BC Commercial Arbitration Act	**Alberta Arbitration Act** *(and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted)*	**Ontario Arbitration Act, 1991**	**Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)**
Stay of court proceedings	15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings. (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is	7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding. (2) The court may refuse to stay the proceeding in only the following cases: (a) a party entered into the arbitration agreement while under a legal incapacity; (b) the arbitration agreement is invalid; (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law; (d) the motion to stay the proceeding was brought with undue delay; (e) the matter in dispute is a proper one for default or summary judgment. …	7. (1) If a party to an arbitration agreement commences a pro-ceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. (2) However, the court may refuse to stay the proceeding in any of the following cases: 1. A party entered into the arbi-tration agreement while under a legal incapacity. 2. The arbitration agreement is invalid. 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.	940.3 C.C.P. vests the court with authority to force performance of the arbitration agreement.

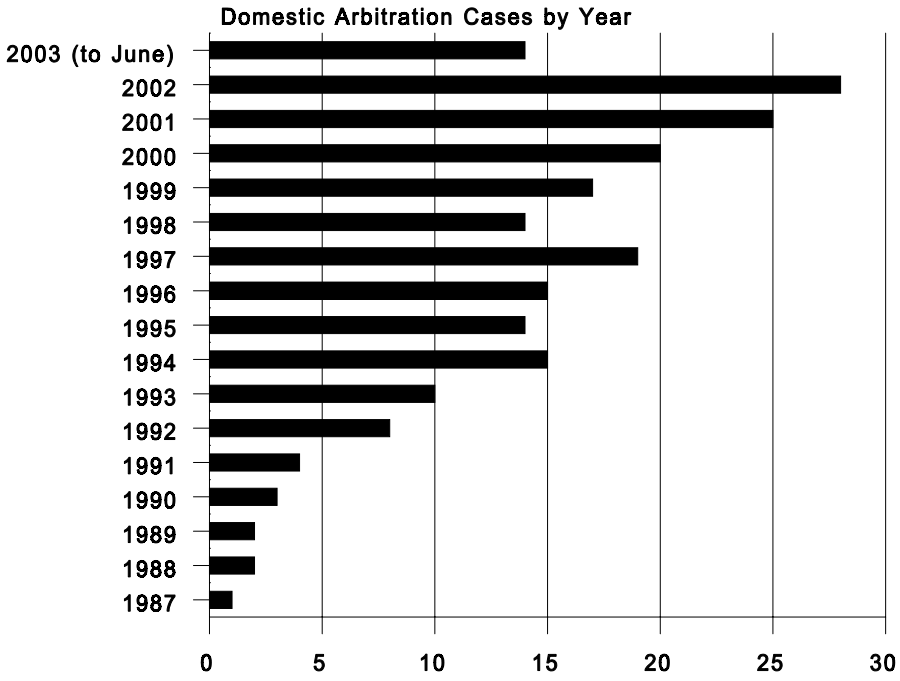
	BC Commercial Arbitration Act	**Alberta Arbitration Act** *(and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted)*	**Ontario Arbitration Act, 1991**	**Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)**
	void, inoperative or incapable of being performed.	(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters. (6) There is no appeal from the court's decision under this section. (S. 8 SAA; s. 7 MAA; s. 9 NSCAA; s. 7 NBAA)	4. The motion was brought with undue delay. 5. The matter is a proper one for default or summary judgment… (5) The court may stay the pro-ceeding with respect to the matters dealt with in the arbi-tration agreement and allow it to continue with respect to other matters if it finds that, (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and (b) it is reasonable to separate the matters dealt with in the agreement from the other matters. (6) There is no appeal from the court's decision.	

	BC Commercial Arbitration Act	**Alberta Arbitration Act** *(and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted)*	**Ontario Arbitration Act, 1991**	**Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)**
Arbitrator may rule on own jurisdiction; arbitration clause is severable	22 (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration. (Those rules state the arbitral tribunal may rule on its own jurisdiction and that an arbitration clause in another agreement shall be treated as an independent agreement.)	17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. (2) The arbitral tribunal may determine any question of law that arises during the arbitration. (3) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the other agreement is found to be invalid. (S. 18 SAA; s. 17 MAA; s. 19 NSCAA; s. 17 NBAA)	17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. (2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.	943 C.C.P. The arbitrators may decide the matter of their own competence. 2642 C.C.Q. An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.

Appendix B


Domestic Arbitration Cases by Issue
Stay
Leave to appeal
Appeal
Set Aside
Misc.
0
20
40
60
80
100
120


Domestic Arbitration Cases by Province
Ontario
British Columbia
Alberta
Saskatchewan
Manitoba
Quebec
Nova Scotia
New Brunswick
0
10
20
30
40
50
60
70
80


Domestic Arbitration Cases by Year
2003 (to June)
2002
2001
2000
1999
1998
1997
1996
1995
1994
1993
1992
1991
1990
1989
1988
1987
0
5
10
15
20
25
30

La réception du droit international des droits de la personne en droit interne canadien : de la théorie de la séparation des pouvoirs vers une approche fondée sur les droits fondamentaux

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La création de normes par le moyen des traités internationaux a décuplé tant par le nombre de conventions qui sont nées que par les sujets qui y sont traités et la nature des obligations qui y sont contenues, ce qui ne va pas sans soulever le problème de la réception de cette prolifération de normes en droit interne. Le Canada a adopté une approche dualiste d'incorporation des normes internationales conventionnelles en droit interne, ce qui signifie que le législateur doit indiquer explicitement son intention de donner effet à ces normes en droit canadien[1].

Le législateur peut employer diverses techniques législatives de mise en œuvre du droit international[2]. Il peut choisir de donner force de loi à toute une convention internationale et l'incorporer entièrement en droit interne[3]. Il peut référer à une convention dans une loi et indiquer clairement qu'il met en œuvre certaines obligations spécifiques auxquelles il a consenti[4] ou déléguer à l'Exécutif le pouvoir d'incorporer le traité en

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1 Sur la signification du monisme et du dualisme, voir entre autres Jean-Maurice ARBOUR, *Droit international public*, 3e éd., Cowansville (Qc.), Éditions Yvon Blais, 1997, p. 143 et 144.

2 Sur ces différentes techniques, voir Sylvie SCHERRER, « L'effet des traités dans l'ordre juridique interne canadien à la lumière de la jurisprudence récente », dans Service de la formation permanente, Barreau du Québec, vol. 31, *Développements récents en droit administratif (2000)*, Cowansville (Qc), Éditions Yvon Blais, p. 57, à la page 62.

3 Par exemple, voir la *Loi concernant la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, L.R.Q., c. C-67.01, art. 1.

4 Par exemple, l'article 98 et l'annexe I de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27, qui incorporent les dispositions de la *Convention de Genève sur les réfugiés* relatives aux motifs d'exclusion. La loi peut également référer de façon limitée à un traité, par exemple à l'intérieur de son préambule. Sur la question de l'incorporation par référence à l'intérieur d'un préambule, voir : *R.* c. *Hydro-Québec*, [1997] 3 R.C.S. 213, par. 127.

droit interne par règlement[5]. Il peut également référer à une convention dans une loi, mais adapter les dispositions qui y sont contenues au contexte canadien[6]. Ces références législatives explicites constituent des preuves suffisantes de l'intention du législateur d'incorporer des normes de droit international en droit interne.

À défaut d'une telle indication explicite du législateur, et cela arrive fréquemment en raison notamment des ramifications complexes et multiples de ces traités sur les ordres fédéral et provinciaux[7], le juge peut, lorsque certaines conditions sont remplies, présumer que le législateur désire néanmoins se conformer aux normes internationales conventionnelles. Toutefois, les conditions d'application de la présomption de conformité au droit international se sont considérablement obscurcies dans la jurisprudence issue de la Cour suprême du Canada depuis une dizaine d'années (I). Dans la tradition de common law, cette opacité grandissante des jugements est porteuse de changements, car elle crée un espace pour le dialogue entre le juge et le juriste. Par des débats riches et animés dans la doctrine canadienne, les contours d'assises théoriques alternatives gouvernant les rapports entre le droit international et le droit interne canadien émergent qui mettent en évidence les tensions entre deux perspectives théoriques sur le concept de la *rule of law* (II). Cette tension est notamment due au fait qu'un nombre important de normes internationales portent sur des questions fondamentales en droit contemporain. L'une d'entre elles est la protection des droits des personnes et la question centrale est de savoir si une place particulière doit être accordée aux normes internationales visant la protection des droits de la personne dans l'ordre constitutionnel canadien (III).

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[5] Par exemple, l'article 21(1)j) de la *Loi sur la protection d'espèces animales ou végétales sauvages et la réglementation de leur commerce international et interprovincial*, L.C. 1992, c. 52 qui accorde expressément au Gouverneur en Conseil le pouvoir de réglementer dans le but d'incorporer la *Convention sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction*, 3 mars 1973, 993 R.T.N.U. 243.

[6] Voir la *Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants*, L.R.Q., c. A-23.01 qui adapte les dispositions de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*.

[7] *Procureur général du Canada* c. *Procureur général de l'Ontario*, [1937] A.C. 326.

I. LES CONDITIONS D'APPLICATION DE LA PRÉSOMPTION DE CONFORMITÉ AU DROIT INTERNATIONAL EN DROIT ADMINISTRATIF CANADIEN

Lorsqu'une loi de mise en œuvre du droit international n'a pas été édictée, le juge peut néanmoins donner un effet indirect aux normes internationales en droit interne en les utilisant comme outil d'interprétation des règles de nature législative[8]. Pour appliquer la présomption, deux conditions doivent cependant être remplies : le texte de la norme de droit interne doit être ambigu et des traces indiquant une volonté législative de donner effet à des normes internationales doivent exister[9]. Dans l'arrêt *Baker* c. *Canada (Ministère de la Citoyenneté et de l'Immigration)*[10], qui a été l'un des arrêts les plus discutés par les chercheurs en droit au Canada ces dernières années[11], la Cour suprême du Canada a donné effet à la présomption de conformité au droit international dans le cadre d'un litige à l'égard duquel les arguments de la majorité sont particulièrement vagues sur l'application de ces deux critères.

En l'espèce, il s'agissait d'interpréter la portée d'un large pouvoir discrétionnaire attribué au ministre de l'Immigration par l'article 114(2) de la *Loi sur l'immigration*[12], qui édicte que « [le] gouverneur en conseil

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8 Pierre-André CÔTÉ, *Interprétation des lois*, 3e éd., Montréal, Éditions Thémis, 1999, p. 466-468; Ruth SULLIVAN, *Driedger on the Construction of Statutes*, 3e éd., Markham (Ontario), Butterworths, 1994, p. 330. Cette présomption de conformité au droit international tire sa source du principe de droit international coutumier *pacta sunt servanda*, codifié à l'article 26 de la *Convention de Vienne sur le droit des traités*, 23 mai 1969, Can. T.S. 1980, no 37. Voir également l'article 27 de cette convention.

9 *Capital Cities Communications Inc.* c. *Conseil de la radiodiffusion et des télécommunications canadiennes*, [1978] 2 R.C.S. 141, p. 173; *Schavernoch* c. *Commission des réclamations étrangères*, [1982] 1 R.C.S. 1092, 1098.

10 *Baker* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817 [ci-après cité : *Baker*].

11 Ainsi que les arrêts *Suresh* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3 [ci-après cité : *Suresh*]; *Ahani* c. *Canada (Ministère de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 72; 114957 *Canada Ltée (Spraytech, Société d'arrosage)* c. *Hudson (Ville)*, [2001] 2 R.C.S. 241; *Pushpanathan* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 1222.

12 *Loi sur l'immigration*, L.R.C. 1985, c. I-2. Cette loi est maintenant abrogée et a été remplacée par la *Loi sur l'immigration et la protection des réfugiés*, précitée, note 4.

peut, par règlement, autoriser le ministre à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe (1) ou à faciliter l'admission de toute autre manière », et par l'article 2.1 du *Règlement sur l'immigration*[13]. Ainsi, par le jeu des dispositions législative et réglementaire, le ministre de l'Immigration peut dispenser un requérant qui invoque des raisons d'ordre humanitaire de faire une demande de résidence permanente de l'extérieur du Canada. Madame Baker, qui vivait illégalement sur le territoire canadien depuis onze ans, a fait une telle demande en invoquant, entre autres, l'intérêt de ses enfants mineurs nés au Canada. En 1994, le ministre refuse la demande de Madame Baker et les notes de l'enquêteur révèlent que ce dernier n'a pas tenu compte de l'intérêt des enfants de la requérante. Madame Baker demande le contrôle judiciaire de cette décision auprès de la Cour fédérale du Canada. Elle estime que la décision de l'agent d'immigration est contraire aux articles 3, 9 et 12 de la *Convention relative aux droits de l'enfant*[14]. Cette Convention a été ratifiée par le Canada, mais elle n'a pas été explicitement incorporée en droit de l'immigration. À la suite d'une interprétation contextuelle des pouvoirs de l'Administration, la majorité de la Cour a conclu au bien-fondé de l'argument de la requérante et a annulé la décision de l'Administration.

Les textes juridiques pertinents dans cette affaire illustrent bien les limites des deux conditions qui doivent être satisfaites afin que le juge puisse appliquer la présomption de conformité en droit public canadien et plus précisément en droit administratif. En effet, ils montrent que le critère de l'ambiguïté du texte législatif n'est pas un discriminant particulièrement utile dans un contexte normatif fortement marqué par l'attribution de pouvoirs discrétionnaires (A). Quant à l'examen de l'incorporation législative formelle des normes conventionnelles de droit international en droit interne, il n'occupe plus une place centrale lors de

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[13] *Règlement sur l'immigration de 1978*, (1978) 112 Gaz. Can. II, 758, art. 2.1 mod. par le *Règlement sur l'immigration de 1978 – Modification*, (1993) 127 Gaz. Can. II, 605 : « Le ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe 114(1) de la loi ou à faciliter l'admission au Canada de toute autre manière. » Ces règlements sont également abrogés, voir note 12. Ils ont été remplacés par le *Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227, 11 juin 2002.

[14] *Convention relative aux droits de l'enfant*, R.T. Can. 1992 n° 3. Cette convention a été ratifiée par les autorités canadiennes le 13 décembre 1991 et, sur le plan international, l'entrée en vigueur a été fixée au 12 janvier 1992 pour le Canada.

l'examen de conformité puisque la majorité de la Cour a délaissé la méthode téléologique d'interprétation des lois (axée sur la stricte recherche du but du législateur à partir des textes juridiques et de sources historiques) pour adopter une approche plus englobante : la méthode contextuelle, favorisant ainsi une perspective « non-originaliste » d'interprétation des lois[15]. Selon cette perspective, l'interprète analyse les dispositions législatives conformément au but qui convient le mieux « aux besoins, aux valeurs publiques ou aux idéaux de justice et de bien commun qui animent la société contemporaine »[16]. Il envisage les sources sous un angle dynamique, « compte tenu des meilleures sources et considérations contemporaines pertinentes et crédibles (perceptions changeantes, nouvelles attentes liées à des changements sociaux, technologiques, politiques, culturels ou économiques, par exemple) »[17]. Il résulte de ce changement de méthode interprétative que toutes les traces étatiques indiquant une volonté de donner effet aux normes conventionnelles de droit international peuvent être prises en compte (B).

A. Le caractère non-discriminant du critère de l'ambiguïté de la norme législative

Selon son sens ordinaire en interprétation des lois, l'ambiguïté signifie que la simple lecture du texte de la norme ne suffit pas pour en comprendre sa signification : deux ou plusieurs interprétations du texte sont possibles et raisonnables. Le rôle de l'interprète est d'identifier la signification qui, selon la dogmatique positiviste, lui semble correcte en tenant compte de la volonté du législateur, telle celle qui apparaît être exprimée dans le texte de la norme (interprétation littérale) ou dans le but

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[15] Les expressions « originaliste » et « non-originaliste » sont directement empruntées au vocabulaire développé en théorie constitutionnelle américaine. P. BREST, « The Misconceived Quest for Original Understanding », (1980) 60 *B.U.L. Rev*. 204, 204 et 205.

[16] Luc B. TREMBLAY, « L'interprétation téléologique des droits constitutionnels », (1995) 29 *R.J.T.* 459. Voir aussi : Luc B. TREMBLAY, « L'interprétation téléologique : une approche cohérentiste et constructiviste », dans *MINISTERIO DE ADMINISTRACIONES PÚBLICAS ET L'INSTITUTO NACIONAL DE ADMINISTRACIÓN PÚBLICA D'ESPAGNE*, *7° Congreso Internacional de metodología jurídica*, 2001, p. 2; K.-M. GEBBIA-PINETTI, « Statutory Interpretation, Democratic Legitimacy and Legal-System Values », (1997) 21 *Seton Hall Legislative* J. 233.

[17] L.-B. TREMBLAY, *id.*, p. 2.

du législateur, tel celui qui peut être vraisemblablement inféré à la lecture du texte de loi dans son entier et de sources historiques (interprétation téléologique). Cette façon de concevoir l'ambiguïté se comprend relativement bien lorsqu'elle est appliquée aux règles primaires d'obligation, pour reprendre la typologie de Hart. L'exemple classique est celui interdisant l'utilisation d'un véhicule dans un parc. Un Nord-Américain comprend clairement que les véhicules à moteur sont visés par l'interdiction. Il comprend aussi que les landaus sont autorisés. Entre ces deux balises externes, d'autres situations sont plus ambiguës : Est-ce que la circulation à bicyclette est permise ou interdite? Dans la ville de Montréal (notamment dans l'arrondissement d'Outremont), un panneau indique aux entrées de chacun des parcs si les bicyclettes peuvent ou non y circuler. Ainsi, l'ambiguïté est dissipée.

Afin de déterminer si le législateur veut donner effet au droit international en droit interne, le concept d'ambiguïté est un discriminant utile, du moins en théorie, lorsque le législateur a clairement fixé les balises externes d'application des règles, comme dans le cas des règles primaires d'obligation. Toutefois, lorsque l'interprète fait face à des règles secondaires (de reconnaissance, de changement ou de décision), le concept d'ambiguïté n'est plus un discriminant utile parce que ce type de règles est ambigu en soi : deux ou plusieurs interprétations sont nécessairement possibles notamment parce que les frontières externes des normes ne sont pas fixées dans le temps. Pour les délimiter, l'interprète ne peut pas simplement tenir compte du texte et du contexte législatif de la règle (y compris son histoire), car ces données figent sur le plan temporel les significations possibles de la norme, alors que le propre des règles secondaires est leur capacité d'évoluer dans le temps. Voici deux exemples.

Dans le cas de la norme floue, la difficulté d'interprétation réside dans la détermination des valeurs de référence qui peuvent servir à un moment donné afin que l'interprète puisse juger si une situation donnée est compatible avec ces valeurs. Les normes secondaires reconnaissant des droits fondamentaux sont des exemples classiques : Est-ce que la liberté d'expression comprend le droit de diffuser de la pornographie? Est-ce que le droit à la vie comprend le droit à l'avortement?[18] En droit constitutionnel

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[18] En droit administratif canadien, les organismes administratifs peuvent, lorsqu'ils rendent des décisions individuelles (tels les commissions administratives, les

canadien, la Cour suprême utilise une méthode évolutive d'interprétation (*the living tree doctrine*) afin d'éviter de figer temporellement la signification des *Lois constitutionnelles de 1867 et 1982*.

Dans le cas de la norme spongieuse, la difficulté d'interprétation réside dans le fait qu'il s'agit de normes qui absorbent les changements factuels et axiologiques extérieurs. Ces normes sont conçues de manière à ce qu'elles puissent s'adapter aux situations spécifiques des individus. Les normes secondaires de décision, telles celles qui confèrent des pouvoirs discrétionnaires à l'Administration publique, en sont un exemple. Pour déterminer si l'autorité administrative a correctement exercé sa discrétion et, par conséquent, validement interprété le sens de la norme[19], la compréhension du contexte factuel est un élément incontournable. Certes, son importance varie en fonction du degré de discrétion conféré à l'organisme administratif, mais les décideurs ne peuvent pas ne pas en tenir compte. De plus, tant et aussi longtemps que le contexte factuel n'est pas connu, le sens de la norme peut et doit demeurer relativement indéterminé. En effet, l'incertitude entourant ce type de norme ne peut jamais être définitivement résolue, car cela aurait pour effet d'entraver l'exercice de la discrétion (*fettering of discretion*), ce qui irait à l'encontre de la volonté même du législateur. À cet égard, le cas des normes qui se situent à l'extrémité du discrétionnaire (comme celles en jeu dans l'arrêt *Baker*) est particulièrement intéressant puisque le texte de ce type de normes n'est pas signifiant en soi. À titre de rappel, la Cour avait à interpréter la portée de l'article 114(2) de la *Loi sur l'immigration* qui

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tribunaux administratifs et les organismes de régulation économique), se pencher sur la validité constitutionnelle des lois qu'ils appliquent et les déclarer inopérantes en vertu de l'article 52 de la *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982* [annexe B de la *Loi de 1982 sur le Canada* (1982, R.-U., c. 11)]. Tel que la Cour suprême l'a décidé dans une trilogie d'arrêts, tous les organismes administratifs qui ont la compétence d'interpréter le droit en vertu de leur loi constitutive ont également le pouvoir de déclarer les règles de droit inconstitutionnelles : *Douglas/Kwantlen Faculty Assn.* c. *Douglas College*, [1990] 3 R.C.S. 570 (collèges); *Cuddy Chicks Ltd*. c. *Ontario Relations Board*, [1991] 2 R.C.S. 5; *Tétreault-Gadoury* c. *Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22.

19 Il est intéressant de noter que la majorité de la Cour suprême a souligné dans l'arrêt *Baker*, précité note 10, qu'il n'était plus nécessaire de distinguer entre l'exercice de la discrétion par l'Administration et son interprétation des paramètres du pouvoir discrétionnaire qui lui a été conféré par la loi pour les fins du contrôle judiciaire de la validité des décisions de cette dernière.

conférait au ministre de l'Immigration le pouvoir d'accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement.

Les multiples significations de cette norme sont influencées par plusieurs variables. Elles fluctuent tout dépendant du type de dispense d'application d'un règlement (et ces règlements font souvent l'objet de modifications), de la situation personnelle de l'administré et du facteur temporel qui affectent le champ des valeurs qui surdétermine la norme. Lorsque l'article 114(2) a été édicté en 1976, l'intérêt des enfants d'un requérant, nés au Canada, n'était pas un facteur pertinent afin de déterminer s'il y avait un motif humanitaire pour accorder une dispense d'application d'un règlement au requérant. En vérité, le concept de « l'intérêt des enfants » était au mieux en émergence au Canada à cette époque. Il ne faisait donc pas encore partie du champ des valeurs de référence de cette norme. Dans l'arrêt *Baker*, la Cour suprême devait déterminer si la décision de l'agent de l'immigration qui a été prise en 1992, et refusant la demande de la requérante, était nulle en raison du fait qu'il n'avait pas tenu compte de l'intérêt des enfants Baker. Bien que la décision du fonctionnaire fût conforme à la pratique canadienne d'immigration en 1992 à cet égard, elle était incompatible avec les obligations contenues dans la *Convention relative aux droits de l'enfant* que le Canada avait ratifié. De plus, lorsque la Cour a annulé la décision en 1999, la décision de l'agent était alors devenue incompatible avec les représentations du gouvernement canadien sur la scène internationale relatives à la mise en œuvre de la Convention dans son droit de l'immigration et avec les changements que le ministre de l'immigration avait apportés aux directives guidant l'exercice de la discrétion des fonctionnaires lors de l'application de l'article 114(2) de la *Loi*.

En résumé, les normes secondaires sont des normes qui peuvent généralement être qualifiées d'ambiguës. Par conséquent, la condition préliminaire d'ambiguïté nécessaire, nous disent les juges, afin d'appliquer la présomption de conformité au droit international peut être aisément satisfaite en droit administratif puisque ce sont principalement des normes secondaires qui gouvernent les actes de l'Administration. Il en résulte que le caractère discriminant de cette condition perd, dans le contexte du droit administratif (et du droit public plus généralement), son utilité. Cette

conclusion trouve d'ailleurs appui dans l'arrêt *National Corn Growers*[20] puisque la Cour suprême a écarté le critère de l'ambiguïté manifeste du texte de la norme pour justifier le recours au droit international comme source d'interprétation d'une disposition législative. La Cour a jugé que l'ambiguïté pouvait également être latente[21].

Ce constat emporte des conséquences sur l'application de la deuxième condition. En effet, les méthodes valides de réception du droit international en droit interne se sont considérablement diversifiées en droit canadien, si bien que les traces d'une volonté législative ne sont plus le seul élément pertinent de la donne interprétative : toutes les traces étatiques comptent.

B. La diversification des traces étatiques indiquant une volonté de donner effet au droit international

La présomption de conformité du droit interne au droit international est une présomption simple qui peut être renversée par une argumentation contraire. Si la loi a vu le jour *après* la convention et que l'interprète conclut qu'elle en découle, à cause par exemple d'une similarité entre les concepts utilisés dans la loi et dans le droit international[22], il est alors logiquement pertinent d'appliquer la présomption. En effet, la présomption existe parce qu'il est postulé que les principes du droit international, « dans la mesure où il[s] constitu[ent] un élément du contexte d'adoption de la loi nationale »[23], font partie du cadre juridique au sein duquel une loi est adoptée et doivent à ce titre être examinés.

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[20] *National Corn Growers Assn*. c. *Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324 (j. Gonthier).

[21] *Id*., 1371.

[22] C'est d'ailleurs un des arguments que le juge Dickson a utilisés dans sa dissidence dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, 348. En matière de droits de la personne, c'est généralement la conclusion qui est tirée par l'État canadien. Pour des exemples d'adoption par le législateur fédéral de normes conventionnelles en matière de droits de la personne, voir William A. SCHABAS, *Précis de droit international des droits de la personne*, Cowansville (Qc), Éditions Yvon Blais, 1997, p. 259-266.

[23] P.-A. CÔTÉ, *op. cit*., note 8, p. 467; R. SULLIVAN, *op. cit*., note 8, p. 330 citée avec approbation par la juge L'Heureux-Dubé dans *Baker*, précité, note 10, par. 70.

En revanche, si la loi a vu le jour *avant* la création d'un instrument international, l'application de la présomption de conformité au droit international perd son sens lorsque l'analyse est axée sur la recherche de la volonté du législateur[24]. Ces situations sont fréquentes en droit canadien et pour éviter d'engager la responsabilité internationale du Canada, en raison d'un défaut de mettre en œuvre les obligations auxquelles le Canada a librement consenti par convention internationale[25], les juges de la Cour suprême ont modifié l'approche interprétative. Ils favorisent une méthode d'interprétation dynamique et évolutive des lois ordinaires, ce qui leur permet de tenir compte d'éléments extérieurs au texte de loi. Cette transition est significative puisque le juge peut maintenant chercher des traces d'une réception du droit international en droit interne en tenant non seulement compte du texte, mais également du contexte axiologique et empirique de la norme.

L'approche contextuelle d'interprétation vise à identifier le sens des termes d'une loi dans son contexte global, ce qui comprend non seulement le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur, les valeurs contenues dans des conventions de droit international et dans le droit public canadien ainsi que dans les directives et autres règles administratives créées par les autorités administratives. En somme, cette perspective interprétative signifie que tant le texte de la norme qui la détermine, que le contexte factuel qui la codétermine, que les valeurs qui la surdéterminent sont des éléments dont il faut tenir compte, même si l'importance de chacun peut varier dans le cadre du travail interprétatif.

Ce changement de méthode d'interprétation emporte plusieurs conséquences. 1. Si le législateur ne veut pas incorporer des normes internationales dans son droit interne, il devra s'exprimer clairement en ce

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[24] Telle était la difficulté dans l'arrêt *Baker*. Comme il a déjà été mentionné à la page 5 du texte, les dispositions législatives et réglementaires avaient été adoptées en 1976 dans un contexte où le concept « intérêts des enfants » n'était, au mieux, qu'en émergence en droit canadien.

[25] Sur les difficultés que cette situation peut engendrer sur le plan de la responsabilité internationale de l'État canadien, voir : Gerald L. MORRIS, « The Treaty-making Power: a Canadian Dilemna », (1967) 45 *Can. Bar Rev*. 478; André PATRY, « La capacité internationale des États fédérés », dans Jacques BROSSARD (dir.), *Les pouvoirs extérieurs du Québec*, Montréal, Presses de l'Université de Montréal, 1967, p. 23.

sens. 2. Il est plus difficile pour le juge de justifier la déduction selon laquelle le silence du législateur signifie qu'il manifeste une volonté de ne pas vouloir se conformer au droit international. 3. Le juge peut donner effet aux normes conventionnelles du droit international en droit interne canadien, lorsque les prescriptions juridiques contenues dans la *Charte canadienne des droits et libertés*, les lois et règlements, les règles de common law et même les actes gouvernementaux et administratifs ne seront pas jugés contraires aux normes du droit international[26]. Ainsi, lorsque le gouvernement canadien fait des représentations sur la scène internationale selon lesquelles son droit interne est déjà conforme au traité – avant la ratification de ce dernier – le juge pourra en tenir compte dans le cadre de l'interprétation contextuelle[27]. Par ailleurs, si – à la suite de la ratification du traité – l'État prend certaines mesures administratives[28] (programmes éducatifs, allocation de ressources financières ou de plans d'aménagements environnementaux[29]), le juge pourra également en tenir compte. L'histoire des actes gouvernementaux, puis administratifs et judiciaires et finalement législatifs pertinents à la mise en œuvre de la *Convention relative au droit de l'enfant* en droit canadien de l'immigration est instructive à cet égard.

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[26] Pour Brunnée et Toope, une conclusion autre conduirait à légitimer l'hypocrisie du gouvernement canadien :

> « Indeed, the Government frequently reports to international bodies that it has already implemented the treaty in question and therefore has met its international commitments. For example, in its reports to the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), Canada has claimed implementation mainly through the Charter of Rights and Freedoms and related constitutional jurisprudence, complemented by various amendments to existing statutes. »

Jutta BRUNNÉE et Stephen J. TOOPE, « A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts », [à paraître dans le Canadian Yearbook of International Law, 9].

[27] Selon Brandon, cette pratique se fait essentiellement en matière de droit des personnes. Elizabeth BRANDON, « Does International Law Mean Anything in Canadian Courts? », (2001) 11 *J.E.L.P.* 399.

[28] *Id*., 420. Brandon emploie en fait les termes « positive action ».

[29] *Id*., 422. La *Convention sur la diversité biologique* (Mai 1992), 31 I.L.M. 818 est un exemple où un traité a été incorporé en droit interne canadien par l'entremise de la méthode d'incorporation par mesures administratives.

La *Convention relative aux droits de l'enfant* inclut le critère de l'intérêt de l'enfant à ses articles 3, 9 et 12. Elle a été ratifiée par le Canada en décembre 1991 et elle est entrée en vigueur (pour le Canada) en janvier 1992. Cette Convention comprend un mécanisme de mise en œuvre qui est le rapport. Dans ses rapports qui doivent être fournis périodiquement, un État doit expliquer les mesures qu'il a adoptées pour donner effet aux droits reconnus dans la Convention ainsi que sur les progrès réalisés dans la jouissance de ces droits. Le Canada a, à ce jour, déposé deux rapports : le premier en 1994 et l'autre en 2001. Entre ces deux rapports, le *Comité des Nations-Unies sur les droits de l'enfant* a fait des recommandations au gouvernement canadien afin qu'il améliore notamment son droit de l'immigration eu égard au respect du principe de l'intérêt de l'enfant.

Dans son premier rapport, le Canada explique au Comité qu'en matière d'application de l'article 114(2) de la *Loi sur l'immigration* sa pratique consiste à ne pas accorder la résidence permanente aux parents qui ont des enfants nés au Canada. En 1995, le Comité recommande au Canada « d'attacher une attention particulière à la mise en œuvre du concept de l'intérêt supérieur de l'enfant […] et de chercher des solutions propres à éviter les mesures d'expulsion causant la séparation des familles, dans l'esprit de l'article 9 de la Convention ». Le 8 mars 1999, le gouvernement canadien complète la révision de son *Guide de l'immigration* et notamment des directives portant sur l'application de l'article 114(2). On peut lire que lors de l'évaluation des cas pouvant entraîner la séparation des parents et des enfants, les agents pourront dorénavant tenir compte de toutes « les circonstances de tous les membres de la famille, en accordant une attention particulière aux intérêts et à la situation des enfants de l'individu sans statut ». De plus, le ministre réfère explicitement à la *Convention relative aux droits de l'enfant* dans le nouveau texte de sa directive. Cette même année, dans l'arrêt *Baker*, la majorité de la Cour suprême fait référence au *Guide de l'immigration* pour argumenter que les directives qui y sont contenues et données par le ministre aux agents d'immigration reconnaissent et révèlent les valeurs et la démarche qui sont énoncées dans la Convention. En 2001, le Canada remet son deuxième rapport au Comité des Nations-Unies. Dans ce rapport, le gouvernement canadien réfère explicitement aux changements du *Guide de l'immigration* afin de donner suite à la recommandation de 1995 du Comité des Nations-Unies. Finalement, dans sa nouvelle *Loi sur l'immigration et la protection des réfugiés* (entrée en vigueur en 2002) le législateur fait explicitement référence au critère de l'intérêt supérieur des

enfants à l'article 25 qui attribue le pouvoir au ministre d'accorder des dispenses pour des motifs humanitaires.

En résumé, le juge canadien peut tenir compte de plusieurs facteurs pour évaluer s'il peut donner effet au droit international en droit interne. Dans la mesure où des traces d'une volonté de donner effet au droit international sont trouvées dans le texte et le contexte factuel ou axiologique de la norme. Toutefois, l'arrêt *Baker* n'a pas manqué de susciter un regain de l'intérêt des juristes de droit public. Ils ont profité de la controverse suscitée par cet arrêt pour engager un dialogue avec la Cour en proposant d'autres théories visant l'aménagement des rapports entre le droit international et le droit interne dans la société contemporaine canadienne.

II. L'ÉMERGENCE DE THÉORIES ALTERNATIVES DANS LA DOCTRINE CANADIENNE

Dans l'ordre constitutionnel de la fédération canadienne, c'est le gouvernement fédéral qui a le pouvoir de traiter sur le plan international. Il peut signer et ratifier des traités sans l'approbation formelle des gouvernements provinciaux et de leurs Assemblées législatives ainsi que du Parlement fédéral. Dans la pratique, toutefois, le gouvernement fédéral ne s'engage généralement pas sur le plan international avant d'avoir entamé des négociations au préalable avec les provinces et d'avoir obtenu des assurances qu'elles mettront en œuvre la convention internationale une fois que celle-ci sera ratifiée (si, bien sûr, elle touche un domaine de compétence provinciale). Un autre élément de la politique canadienne qu'il est important de souligner est que la séparation des pouvoirs entre les organes étatiques n'est pas étanche. Le parti politique qui fait élire la majorité de ses candidats gagne les élections et forme le gouvernement. Ce gouvernement détient aussi la majorité des sièges au sein de l'organe législatif. En somme, lorsque le gouvernement fédéral engage la responsabilité internationale du Canada par la ratification d'un traité, c'est parce qu'il sait qu'il obtiendra la coopération du Parlement fédéral, et probablement celle des gouvernements et assemblées législatives provinciaux.

En tenant compte de ces données, il est plus facile de comprendre les raisons politiques qui justifient l'application de la présomption de conformité au droit international même en l'absence d'une volonté claire du législateur en ce sens. En prenant pour acquis que la majorité de la Cour suprême a tenu compte de cette réalité politique lorsqu'elle a rendu

son jugement dans l'arrêt *Baker*, elle a néanmoins fait preuve de prudence. En effet, bien qu'elle ait conclu que la présomption de conformité entre le droit interne et le droit international recevait application en l'espèce, la juge L'Heureux-Dubé a clairement indiqué que les normes de la *Convention relative aux droits de l'enfant* expriment des valeurs chères à la société canadienne, lesquelles *peuvent* être « prises en compte dans l'approche contextuelle de l'interprétation des lois. »[30]

La majorité a donc insisté sur la force persuasive plutôt qu'obligatoire des normes internationales auxquelles les instances étatiques sont présumées vouloir se conformer, sans donner les justifications théoriques en droit sur lesquelles elle a fondé son raisonnement. Depuis lors, deux grandes perspectives théoriques d'application du droit international en droit interne ont émergé dans la doctrine canadienne. Le point de convergence entre les auteurs est qu'ils accordent une place plus importante à une conception pluraliste des ordres juridiques, sans complètement délaisser l'idée d'une certaine prépondérance de l'ordre juridique interne. Dans les deux cas, toutefois, les auteurs cherchent à mieux circonscrire le rôle des organes étatiques (autres que le législateur) dans le maintien d'un équilibre entres les ordres étatique et international. Deux courants s'affirment. Le premier donne préséance au pouvoir discrétionnaire du gouvernement (A). C'est à lui qu'il revient de déterminer dans quelle mesure la norme internationale aura du poids dans l'ordre interne. Le deuxième donne préséance au pouvoir discrétionnaire du juge (B).

A. La préséance du pouvoir discrétionnaire du gouvernement

Le point de départ des réflexions des professeurs Brunnée et Toope[31] repose sur la critique du travail accompli par nos tribunaux supérieurs en matière d'interprétation du droit international. Plus spécifiquement, ils dénoncent à la fois l'absence d'uniformité des jugements et la tendance à définir la norme internationale comme ayant une simple valeur persuasive, indépendamment du fait que celle-ci soit issue ou non d'un traité liant le Canada sur la scène internationale Ils s'inquiètent des dangers que peut représenter l'arrêt *Baker*[32] à plus long terme. Ils estiment qu'une

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30 *Baker*, précité, note 10, par. 70.

31 J. BRUNNÉE et S. J. TOOPE, *loc. cit*., note 26.

32 Et la suite de celui-ci, nommément l'arrêt *Suresh*, précité, note 11.

utilisation strictement persuasive de toutes les normes du droit international non-incorporées en droit canadien ne peut qu'effriter la présomption de conformité et réduire les obligations internationales du Canada au rang d'anecdotes.

Afin de contrer cet effet qu'ils jugent indésirable, Brunnée et Toope proposent une méthode d'interprétation fondée sur la distinction entre les instruments internationaux ratifiés et non ratifiés. Dès que le Canada ratifie un traité, il engage sa responsabilité internationale. Pour cette raison, les tribunaux sont contraints de donner effet aux normes du droit international en droit interne, indépendamment de leur incorporation par voie législative[33], et d'interpréter le droit canadien conformément aux normes contenues dans les traités qu'il a ratifiés. Lors du travail d'interprétation, les auteurs suggèrent aux juges de s'attarder au sens réel du traité et, le cas échéant, d'utiliser les règles d'interprétation inscrites dans la *Convention de Vienne sur le droit des traités*[34].

Selon cette perspective théorique, les juges ne peuvent plus, comme l'a fait la majorité de la Cour suprême dans l'arrêt *Baker*, considérer un traité ratifié et non incorporé comme possédant une simple valeur persuasive pouvant guider, à la seule discrétion du juge, l'interprétation du droit canadien[35]. En revanche, Brunnée et Toope privilégient la solution retenue dans l'arrêt *Baker* pour les normes internationales qui ne lient pas le Canada sur la scène internationale[36]. Les juges doivent alors conserver la

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[33] J. BRUNNÉE et S. J. TOOPE, *loc. cit*., note 26, 26 et 27.

[34] *Convention de Vienne sur le droit des traités*, précitée, note 8.

[35] J. BRUNNÉE et S. J. TOOPE, *loc. cit*., note 26, 17 et 18 :

> «The Convention on the Rights of the Child should not merely have been at the Court's discretion to 'help inform' its interpretative effort-something less than what is required by the traditional presumption of conformity. Instead, the Court was obliged to strive, to the extent possible, for an interpretation that is consistent with the legal commitments that Canada made by ratifying the Convention. »

[36] Pour ces auteurs, ces normes sont : les règles de traités non ratifiés par le Canada, les décisions de tribunaux internationaux; les parties non contraignantes d'un traité ratifié (préambule, dispositions non impératives), les déclarations de principes et codes de conduite n'ayant pas encore le statut de coutume internationale. La coutume internationale, malgré les tergiversations de la jurisprudence, doit recevoir selon les auteurs une application directe en droit interne canadien. De ce fait, tout comme pour les traités ratifiés par le Canada, les tribunaux ont l'obligation d'interpréter toute disposition législative ou règle de common law en accord avec le droit coutumier international. J. BRUNNÉE et S. J. TOOPE, *loc. cit*., note 26, 25 et 26.

discrétion de s'y référer dans les cas qu'ils estiment adéquats. Contrairement aux normes issues de traités ratifiés, ces normes non-contraignantes peuvent être utilisées à titre persuasif lors de l'interprétation du droit canadien.

L'approche de Brunnée et Toope a été critiquée parce que la distinction créée entre les normes internationales contraignantes et non contraignantes polarise l'influence du droit international en droit canadien sur un plan strictement formaliste, ce qui a pour effet de soumettre tout le droit international, sans distinction entre ses normes, à la seule volonté d'intérêts nationaux. Lorsque le Canada ratifie un traité, l'application du droit international en droit interne s'effectue alors sans discernement[37]. Le juge perd son pouvoir discrétionnaire[38].

B. La préséance du pouvoir discrétionnaire du juge

Contrairement à Brunnée et Toope, d'autres auteurs estiment que l'arrêt *Baker* constitue un tournant significatif dans la jurisprudence canadienne. En consacrant l'importance du droit international à titre de source interprétative des lois ordinaires[39], indépendamment de sa ratification ou

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[37] Karen KNOP, « Here and There: International Law in Domestic Courts » (2000) 32 *N.Y.U.J. Intl L. & Pol.* 501, 505 :

> « […] proponents of the traditional model have defended bindingness over persuasion on the ground that bindingness provides a safeguard against hegemony. But this defence assumes that international law generally, and therefore international law binding on domestic courts, is not hegemonic, an assumption that many would question. […] If the domestic application of international law is equated with the recognition of a global standard of good, then any and every domestic application is desirable. But this tacitly locates the authority of international law in its embodiment of liberal democracy, rather than understanding its authority as partly created by the reasoning in each case. »

[38] *Id*., 516. Elle dénonce en effet que :

> « The language used to promote domestic courts as instruments of international law—implementation, compliance, enforcement—only further de-emphasizes the exercise of judgment involved in translating from international to domestic law. Rhetorically, domestic judges are reduced to bureaucrats who, depending on the scholarly viewpoint, simply need to be better trained, better motivated, or more up-to-date. »

[39] E. BRANDON, *loc. cit*., note 27, 444 exprime bien ce point de vue : « The relevance of treaties hinges more on their importance to Canada as expressions of international values and principles, than on their precise legal status at the domestic level. Thus the

de son incorporation en droit interne, la majorité de la Cour suprême propose une analyse centrée sur le contenu normatif du traité[40]. Le juge, figure centrale dans un système parlementaire, est investi de la tâche de déterminer quelles sont les normes internationales qui méritent d'être considérées plus sérieusement que d'autres. Dans la doctrine, on peut identifier une version forte et une version faible de cette approche théorique favorisant l'exercice de la discrétion par le juge, plutôt que par le gouvernement. Selon la version forte, l'exercice du pouvoir discrétionnaire du juge n'est contraint par aucune limite balisant son pouvoir de faire le choix des normes internationales qui compteront lors du travail interprétatif. Selon la version faible, l'exercice du pouvoir discrétionnaire par le juge est partiellement lié par des principes de droit public.

C'est la professeure Knop qui a proposé une version forte de cette perspective théorique. Selon cette auteure, les tribunaux devraient considérer le droit international comme un droit étranger et l'analyser en conséquence[41]. En utilisant les méthodes interprétatives de droit comparé, lesquelles accordent une valeur strictement persuasive aux normes étrangères, les tribunaux peuvent accorder aux normes internationales, qu'elles soient contraignantes ou non, la place qui leur revient en droit canadien : « Since foreign law is not binding, we must be persuaded of its relevance, and comparative law offers us structures of persuasion that may prove illuminating for international law as well. Ultimately, the understanding of persuasion found in comparative law may challenge the narrowness of what international lawyers model as the domestic application of international law. »[42] Au nom d'une application moins déterministe du droit international, Knop limite la portée de la présomption de conformité au droit international puisque même en présence d'un traité ratifié, l'application de la présomption ne peut imposer une contrainte au pouvoir judiciaire d'interpréter le droit interne conformément au droit international[43]. Selon cette perspective, l'opinion de la majorité dans *Baker* constitue pour Knop un modèle de flexibilité et de

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limits of the contextual approach to statutory interpretation are being redefined to include a large body of international law. »

40 *Id*.

41 K. KNOP, *loc. cit*., note 37, 520.

42 *Id*., 530 et 531.

43 *Id*., 525 et suiv.

nuance à suivre pour les tribunaux puisque les juges conservent l'entière discrétion d'utiliser, à titre persuasif, les normes et valeurs du droit international qu'ils estiment adéquates pour résoudre le litige[44].

L'approche Knop a été critiquée par Brunnée et Toope qui craignent que l'absence de contrainte sur le pouvoir discrétionnaire du juge mène, à plus long terme, vers moins que plus de nuance dans le choix des normes internationales servant à interpréter le droit interne[45]. C'est dans cette optique que s'inscrit le projet de Van Ert puisqu'il cherche à expliciter, dans sa version faible de l'approche théorique de la réception du droit international en droit interne[46], les principes de droit public qui doivent guider le juge lorsqu'il exerce son pouvoir discrétionnaire. Pour cet auteur, deux principes gouvernent l'entière question de l'utilisation des traités en droit interne canadien : l'autonomie gouvernementale et le respect du droit international. Le principe de l'autonomie gouvernementale réaffirme la capacité d'une communauté de s'autodéterminer librement, sans influence externe. Par influence externe, il réfère à toute institution (juridique, politique ou autre) n'ayant pas fait l'objet d'une approbation expresse par une communauté donnée. Celle-ci ne peut être obtenue qu'à la suite d'un processus décisionnel démocratique, lequel est formé de délibération, de représentation et de participation[47]. Selon l'auteur, seul l'organe législatif, à l'exclusion de l'organe exécutif, regroupe ces trois caractéristiques; accepter que l'Exécutif puisse légiférer sans le concours du Parlement viole le principe d'autonomie gouvernementale.

Quant au principe du respect du droit international, le juge doit en tenir compte, car ce droit trouve son fondement non seulement dans la raison et la justice, mais aussi dans le fait que le Canada est membre du concert des nations : « […] if we do not respect international law we must cease to be

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44 K. KNOP, *loc. cit*., note 37, 535.

45 J. BRUNNÉE et S.J. TOOPE, *loc. cit*., note 26, 19. « We fear that this approach [Knop], if not carefully applied as a supplementary analytical tool, could easily lead to less rather than more nuance. The temptation may be great to treat all international law, whether binding on Canada or not, as « optimal information » and to disregard the particular interpretative onus that is placed upon the courts by the presumption of conformity with Canada's international obligations. »

46 Gibran VAN ERT, « Using Treaties in Canadian Courts », (2000) 38 *C.Y.B.I.L*. 3.

47 *Id*., 7.

part of the civilized world. »[48] Pour Van Ert, tout traité ratifié, qu'il soit ou non incorporé, produit des effets juridiques en droit interne. La présomption de conformité s'applique dans ce cas et le juge doit interpréter les normes de droit international de manière libérale[49]. Cependant, Van Ert ajoute que le juge doit limiter les effets du droit international en droit interne, dès que le principe d'autonomie gouvernementale est trop sérieusement affecté par l'application du principe du respect du droit international. Afin d'aider les juges à déterminer si les effets vont au-delà de ce qui devrait être acceptable, Van Ert propose un test dont les composantes reviennent en somme à une analyse formaliste qui ne tient pas compte, du moins explicitement, du contenu des normes de droit international[50].

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Dans l'état actuel de la jurisprudence canadienne, il semble bien que la majorité de la Cour suprême penche en faveur de l'approche Van Ert dans la mesure où elle a cherché à maintenir un équilibre entre les principes du droit interne et du droit international dans le cadre d'un litige faisant appel à des normes de droit international qui avaient été ratifiées par le Canada.

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48 *Id*., il reprend ainsi les propos de Blackstone.

49 Selon van Ert, la présomption devrait s'appliquer aux lois tant antérieures que subséquentes à la ratification du traité, et devrait viser de façon égale tant les lois d'incorporation que les lois dites ordinaires. *Id*., 37 et 38.

50 G. VAN ERT, *loc. cit*., note 48, 52 et 53 :

> « First, a court should consider the extent to which applying the treaty presumption to the case at bar will relieve the executive of the need to seek implementation of the treaty by Parliament or the provincial Legislatures. […] A second consideration should be the content of the treaty obligation under consideration. Treaty provisions of a purposive, interpretive, or general nature will often be more susceptible to judicial application by means of the treaty presumption than specific, particular, or detailed commitments, which will usually require implementing legislation to be given domestic legal effect. […] Finally, courts should be cognizant of the respective roles of legislatures and the judiciary in the Canadian reception system. The system assigns the task of vindicating the principle of self-government to Parliament and the provincial Legislatures in exercise of their sovereignty to legislate in violation of international law and their discretion as to whether, and to what extent, to implement treaty obligations incurred by the executive. In contrast, the role of asserting the principle of respect for international law is confided in the judiciary. »

En effet, dans l'arrêt *Baker*, la Cour suprême a fait référence à des principes et valeurs du droit public lors du processus d'interprétation. La Cour estime donc que la discrétion des juges n'est pas illimitée lorsqu'il s'agit de donner effet à la présomption de conformité entre le droit interne et le droit international. Toutefois, la jurisprudence de la Cour est encore trop rudimentaire pour qu'il soit possible d'affirmer avec certitude si la forme (la ratification d'un traité) compte toujours davantage en droit canadien que le contenu de la norme. Néanmoins, certains développements, notamment dans l'arrêt *Baker*, laissent croire qu'une majorité de juges seraient enclins à accorder une place particulière aux normes internationales visant la protection des droits de la personne.

III. LA PLACE PARTICULIÈRE DES NORMES INTERNATIONALES VISANT LA PROTECTION DES DROITS DE LA PERSONNE

La protection des droits de la personne occupe un espace non négligeable dans la pensée juridique occidentale contemporaine. L'essor du droit international des droits de la personne est un facteur qui a joué un rôle de premier plan à cet égard. C'est dans la foulée de ces développements que les entités fédérale et provinciales de l'État canadien ont élaboré des instruments généraux de protection des droits et libertés fondamentaux des citoyens, dont la *Charte canadienne des droits et libertés*. Par ailleurs, un sondage effectué en 2002 indiquait que 92 % de 88 % des Canadiens connaissant la *Charte* adhèrent à ce projet de protection des droits de la personne.

À plusieurs reprises, la Cour suprême a eu l'occasion de constater la similitude entre les droits et libertés fondamentaux protégés par la *Charte* et ceux inscrits dans les normes internationales des droits de la personne. Cet argument a non seulement servi à justifier une interprétation large des droits protégés par la *Charte* de manière à en assurer la compatibilité avec les normes internationales, mais a également eu pour conséquence de donner aux normes internationales un effet juridique en droit constitutionnel canadien. Puisque, en vertu de l'article 32 de la *Charte*, l'État canadien a créé un ordre juridique supérieur qui lie le Parlement, les législatures provinciales et les gouvernements (incluant les administrations publiques), il n'est pas étonnant, par ricochet, que l'Administration s'estime liée par les normes du droit international contenues dans les jugements de la Cour portant sur la *Charte*. Il n'est pas étonnant non plus que l'Administration publique exprime cette obligation par diverses tech-

niques normatives, incluant les directives et autres règles administratives, afin de développer son droit de manière compatible à ces normes[51].

En s'attribuant ce rôle, l'Administration agit de façon cohérente avec la prescription de l'article 32 de la *Charte*, mais ce constat ne signifie pas d'emblée qu'elle peut utiliser de son propre chef des instruments normatifs tels la directive, afin de donner effet à un droit de la personne dont la source provient uniquement du droit international. Pour plusieurs constitutionnalistes canadiens, la prétention contraire promeut une thèse indéfendable dans un système juridique où prédomine le principe de la séparation des pouvoirs et duquel découle la doctrine dualiste de réception du droit international en droit interne. Toutefois, cette conception formelle du droit constitutionnel perd du terrain puisque la Cour suprême recourt depuis quelques années à des principes non-écrits, la constitution de common law[52], afin de donner effet à des valeurs fondamentales structurant l'ordre démocratique canadien. En s'appuyant sur ces développements, d'autres constitutionnalistes canadiens argumentent que la constitution de common law porte un coup fatal à la doctrine dualiste en droit interne lorsqu'il s'agit de donner effet à certaines valeurs fondamentales issues du droit international (A). C'est par l'application de ces principes constitutionnels non-écrits que ces spécialistes argumentent la légitimité de la réception des normes internationales par tous les organes étatiques, dans la mesure toutefois ou ces normes reflètent des valeurs fondamentales protégées par la constitution de common law. Lorsqu'il s'agit des droits de la personne, le problème qui se pose est de déterminer si un droit reconnu par une norme internationale (mais non par une norme constitutionnelle écrite) est une valeur protégée par la constitution de common law. Afin de résoudre cette difficulté, le concept de droit cosmopolite a été proposé (B).

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[51] Voir les exemples dans : France HOULE, *Les règles administratives et le droit public : aux confins de la régulation juridique*, Cowansville (Québec), Éditions Yvon Blais, 2001, p. 161-166 et 189-192; France HOULE, « La lecture des blancs dans le droit et la validité des règles administratives : essai sur deux modèles issus du positivisme juridique », dans Ysolde GENDREAU (dir.), *Le lisible et l'illisible*, Montréal, Éditions Thémis, p. 52-125.

[52] *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217 et *Renvoi relatif à la rémunération des juges*, [1997] 3 R.C.S. 3; *Baker*, précité, note 10. Sur la Constitution de common law, voir entre autres, Mark WALTERS, « The Common Law Constititution in Canada: Return of Lex Non Scripta as Fundamental Law », (2001) 51 *U.T.L.J.* 91.

A. La constitution de common law

La constitution de common law comprend tout principe constitutionnel non écrit représentant des valeurs fondamentales de la société canadienne[53]. Parmi ces valeurs, il y a celles relatives à la démocratie parlementaire, à l'État de droit et aux droits de la personne.[54]. La *Charte canadienne des droits et liberté* constitue une forme de confirmation de certaines de ces valeurs fondamentales[55]. Par le recours aux principes constitutionnels de common law, Dyzenhaus estime possible de légitimer l'utilisation de la présomption de conformité du droit interne au droit international lorsque les valeurs contenues dans ce dernier sont non seulement compatibles avec les valeurs prévues dans la *Charte*, mais également avec d'autres dispositions de droit positif relatives aux droits de la personne. En somme, la constitution de common law accorde aux individus une protection conforme aux valeurs fondamentales, et ce, même en l'absence de dispositions légales formelles à cet effet[56].

C'est en ce sens que pour Dyzenhaus, la constitution de common law consacre une conception plus riche de la démocratie menant vers une application beaucoup moins étanche du principe de la séparation des pouvoirs. Pour cette raison, il critique le principe de l'autonomie gouvernementale défendue par Van Ert. Dyzenhaus souligne que la prétention selon laquelle seul le Parlement est représentatif de l'ordre démocratique relève d'une conception pauvre de ce dernier. La démocratie est l'une des valeurs fondamentales enracinées dans la constitution de common law et, de ce fait, elle s'enrichie par l'interaction avec les autres valeurs du droit constitutionnel écrit et non-écrit. Il en résulte que l'ordre démocratique ne peut être considéré comme exclusivement issu de l'activité législative[57],

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[53] David DYZENHAUS, « Constituting the Rule of Law: Fundamental Values in Administrative Law », (2001-2002) 27 *Queen's L. J.* 445; voir aussi : David DYZENHAUS et Evan FOX-DECENT, « Rethinking the Process/Substance Distinction : *Baker* v. *Canada* » (2001) 51 *U. of Toronto L.J.* 193; David DYZENHAUS, Murray HUNT et Michael TAGGART, « The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation », (2001) 1 *Oxford U. Commonwealth L.J.* 5.

[54] D. DYZENHAUS, *loc. cit*., note 53, 6 et 35.

[55] *Id*., 6.

[56] *Id*., 38.

[57] La vision enrichie de la démocratie proposée par Dyzenhaus l'amène à critiquer la dissidence des juges Iacobucci et Cory dans l'arrêt *Baker*, précité, note 10, ainsi que

notamment lorsqu'il s'agit de mettre en œuvre des protections relatives aux droits des personnes. Sur ce point, Dyzenhaus est d'accord avec Walters :

> « This argument is more in line with the democratic vision, since the plausibility of the idea of the common law constitution is said to be premised on a blurring of the division between the powers. Walters […] suggest that the idea of a common law constitution is more about the protection of fundamental values and less about constitutional rules relating to institutional structure, including the separation of powers. Hence, unless a violation of such structure 'also amounts to the violation of basic human rights', structure should not be asserted as part of the unwritten constitution. »[58]

Selon Dyzenhaus et Walters, il revient au juge d'exercer sa discrétion afin d'établir, d'utiliser ou d'interpréter diverses règles de common law. En ce qui concerne les règles de common law faisant état de valeurs fondamentales propres à la société canadienne (autre que la séparation des pouvoirs), ils estiment que le juge doit leur accorder un poids prépondérant en droit canadien, notamment par l'entremise d'une application généreuse de la présomption de conformité[59]. Leur refuser cet effet signifie l'adhésion à une vision formelle du constitutionnalisme, consacrant la préséance du principe de la séparation des pouvoirs au détriment des autres valeurs fondamentales, telles la protection des droits

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l'*obiter dictum* du juge Lamer de la Cour suprême dans l'arrêt *Cooper* c. *Canada (Commission canadienne des droits de la personne)*, [1996] 3 R.C.S. 854. Dans cette affaire, le juge Lamer (qui était alors juge en chef de la Cour) avait émis l'opinion selon laquelle les questions relatives à *Charte* devraient relever exclusivement du pouvoir judiciaire et non des tribunaux administratifs, contrairement à la jurisprudence constante de la Cour suprême sur cette question depuis la trilogie *Douglas/Kwantlen Faculty Association* c. *Douglas College*, précité, note 18, *Cuddy Chicks Ltd*. c. *Commission des relations de travail de l'Ontario*, précité, note 18 et *Tétreault-Gadoury* c. *Canada (C.E.I.)*, précité, note 18. Dyzenhaus est d'accord avec les propos de la juge McLachlin qui, dans cette même affaire, s'inscrit contre l'opinion du juge Lamer. Il explique : « I call the vision of constitutionalism [of McLachlin] democratic, because, in her view, if judges have such exclusive jurisdiction, then the Charter is put out of reach of the people whom it serves in part, as it is before tribunals rather than the courts that most people are likely to contest their rights. » D. DYZENHAUS, M. HUNT et M. TAGGART, *loc. cit*., note 53, 21.

58 D. DYZENHAUS, *loc. cit*., note 53, 27.

59 D. DYZENHAUS et E. FOX-DECENT, *loc. cit*., note 53, 17.

de la personne. En revanche, leur accorder une telle place milite en faveur d'une vision démocratique du constitutionnalisme[60].

Toutefois, il ne s'agit pas de laisser le juge sans paramètres décisionnels afin de déterminer quelles sont les valeurs fondamentales relatives aux droits des personnes devant recevoir application en droit interne. À cet égard, les normes du droit international serviraient d'étalon de mesure plus objectif que le recours aux préférences personnelles des juges, administrateurs et législateurs (lorsqu'il s'agit d'un droit non protégé par les chartes). Elles agiraient comme un rempart contre une version appauvrie des protections pouvant être accordées aux personnes. Pour Walters, ces balises posées par le droit international des droits de la personne forment le substrat d'un concept, celui du droit cosmopolite, sur lequel peut reposer une argumentation servant à justifier la légitimité d'un ordre démocratique canadien fondé sur le respect des droits de la personne.

B. Le droit cosmopolite

Le concept de droit cosmopolite signifie l'ensemble des droits individuels inaliénables découlant d'un principe de justice humanitaire universelle constituant le fondement de la théorie du droit rationnel de Kant[61]. Fondée sur la raison et non sur le droit divin ou l'expérience humaine, cette théorie pose que l'être humain doit être considéré comme une fin en soi et non comme un moyen. Selon Kant, toute morale ou système normatif doit servir à promouvoir et à garantir les droits et libertés individuels de chaque citoyen, indépendamment de sa nation, de sa race ou de sa religion. De plus, il argumente que seul un mécanisme de protection des droits de la personne à l'échelle globale, qu'il nomme le droit cosmopolite, peut constituer une mesure efficace. En effet, le

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[60] Sur le concept de constitutionnalisme démocratique, voir la note 57 ainsi que le texte de D. DYZENHAUS, note 53.

[61] Mark D. WALTERS, « The Common Law Constitution and Legal Cosmopolitanism », texte manuscrit, p. 11 (à paraître). Walters s'inspire des enseignements de Kant et de ses successeurs, notamment John Rawls et David Held. Sur ces auteurs, voir David HELD, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge, Polity Press, 1995, p. 227-234; Emmanuel KANT, *Projet de paix perpétuelle (1795-96)*, trad. par J. Gibelin, Paris, Vrin, 1990; John RAWLS, *The Law of Peoples*, Cambridge, Harvard University Press, 1999, p. 10.

caractère transcendant de la théorie du droit rationnel la rend imperméable face à l'action ou l'inaction des acteurs étatiques et non-étatiques puisqu'elle doit être considérée comme complètement distincte et autonome des ordres de droit interne et international. Walters argumente que le concept kantien du cosmopolitisme, vu à la lumière de considérations normative et historique, peut fournir « a compelling theoretical explanation for, or a least a useful theoretical insight to, the relationship between the common law constitution, judicial review, and international law »[62]. Sur le plan historique, il montre notamment que le droit cosmopolite fait partie depuis longtemps de la constitution de common law[63]. Il conclut que la common law cosmopolite comprendrait ainsi un corpus de valeurs fondamentales, transcendantes et indépendantes des ordres juridiques interne et international relatifs aux droits des personnes, pris dans un sens large. Sur le plan normatif, il estime que l'intégration du droit cosmopolite à la constitution de common law permet l'utilisation d'une méthode d'interprétation de rechange à la méthode traditionnelle de telle sorte que les juges puissent se référer aux valeurs d'un traité non incorporé en droit interne, non pas comme s'il s'agissait de droit positif, mais « as a body of general or universal legal principles having force independently of positive sources »[64].

> « […] a vigorous approach by common law judges to the articulation of "humane standards" for executive decision-making by more consistent and active reference to international legal sources need not to be considered "subverting the constitution of states" or "misuse of legal concepts and terminology" or upsetting "the balance maintained by our Parliamentary tradition". The

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62 M.D. WALTERS, *id.*, p. 2.

63 *Id*., p. 8. Le droit universel des nations a été reconnu dès 1608 dans le *Calvin's Case*, (1608) 2 St Tr 559, 669-670 : the « common law of England is grounded upon the law of God, and extends itselfe to the originall lawe of nature, and the univesall lawe of nations ». Blackstone était du même avis, voir William BLACKSTONE, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1765, I, 43. Le point de vue de Blackstone a été repris récemment dans une décision anglaise, *Mabo* v. *Queensland (No 2)*, (1992) 175 CLR 1, 42. Le juge Brennan de la High Court a écrit « international law is a legitimate and important influence on the development of common law. » Ces citations sont tirées du texte de M. D. WALTERS, *id.*, p. 5.

64 M.D. WALTERS, *id.* Il cite Alan BRUDNER, « The Domestic Enforcement of International Covenants on Human Rights: A Theoritical Framework », (1985) 35 *U. of Toronto L.J.* 219, 222.

> principles of parliamentary sovereignty and separation of powers cannot be threatened by the "backdoor" incorporation of international legal norms by this approach because the norms that qualify as cosmopolitan, as opposed to the positive legal norms in which they are evidenced, are not just parts of international law but also part of the *ius cosmopoliticum* or *ius gentium* that forms an integral part of the common law constitution. »[65]

Selon cette méthode, tous les actes gouvernementaux et législatifs seraient soumis aux impératifs de la constitution non-écrite comprenant le droit de la common law-cosmopolite, sans que le juge ait à démontrer l'ambiguïté de la loi[66]. De plus, puisque ces valeurs font partie de la constitution de common law, le juge pourrait même y recourir lorsqu'il estime qu'une norme de droit interne est contraire au droit cosmopolite[67]. Mais plus important encore, la perspective de Walters pose les jalons d'une discussion sur la valeur constitutionnelle des normes internationales relatives aux droits de la personne en droit interne et qui ne sont pas explicitement inscrites dans les chartes des droits et libertés[68].

CONCLUSION

L'État canadien adhère toujours, dans son discours officiel, à l'approche dualiste d'incorporation du droit international conventionnel en droit interne, ce qui reflète le rôle traditionnel du législateur dans une démocratie de type parlementaire. Toutefois, la presque totalité des conventions que le Canada signe ne sont pas reçues dans une loi de mise en oeuvre. Afin de remédier à cette situation embarrassante, les juges de la Cour suprême appliquent la présomption de conformité du droit interne au droit international de façon large dans la mesure où les conditions

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65 M.D. WALTERS, *id.*, p. 13.

66 M.D. WALTERS, *id*., p. 4. Dans l'arrêt *Baker*, précité, note 10, par. 70, la juge L'Heureux-Dubé aurait laissé entendre qu'il serait possible de référer à un traité même lorsque les dispositions législatives sont claires.

67 M.D. WALTERS *id*., p. 14.

68 Sur les dispositions constitutionnelles écrites relatives aux droits des personnes, *Pushpanathan* c. *Canada (Ministre de l'emploi et de l'Immigration)*, précité, note 11; *Slaight Communications Inc*. c. *Davidson* [1989] 1 R.C.S. 1038, par. 23; *Suresh* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, précité, note 11.

préliminaires d'application de la présomption – l'ambiguïté du texte législatif et les traces d'une volonté législative de donner effet au droit international – ne sont plus, somme toute, discriminantes. En effet, en favorisant une méthode contextuelle d'interprétation des lois autorisant ainsi l'interprète à tenir compte de tous les actes étatiques antérieurs, concomitants et postérieurs à la ratification du traité, la Cour suprême favorise une perspective non-originaliste d'interprétation des lois. De ce point de vue, les sources sont considérées légitimes si elles sont pertinentes et la pertinence s'infère des justifications qui sont données. Ce faisant, le juge peut non seulement faire appel à des principes et valeurs du droit international pour interpréter la loi, mais aussi justifier son appui aux initiatives hétérodoxes de l'Administration publique lorsque celle-ci reçoit des normes conventionnelles de droit international en droit interne canadien par le moyen de règles administratives (telles les guides, directives et politiques).

Cette orientation de la Cour suprême est importante parce qu'elle est annonciatrice de changements profonds dans l'organisation, le rôle et les pouvoirs des institutions publiques de l'État canadien à l'égard du droit international, mais également à l'égard de lui-même, dans la mesure où le juge et l'Administration publique seront progressivement appelés à devenir des figures actives dans la mise en œuvre du droit international en droit interne canadien. En effet, face aux multiples ramifications et interrelations entre les ordres juridiques en droit contemporain, il est incertain que le Parlement puisse, à lui seul, mettre en œuvre ce grand projet du rapprochement des ordres interne et international. À cet égard, les théories de réception du droit international en droit interne qui ont été proposées par les juristes canadiens depuis l'arrêt *Baker* convergent sur un point : tous les actes étatiques constituent des indications utiles, bien qu'ils n'aient pas tous la même valeur, pour le juge afin de déterminer l'effet du droit international en droit interne.

Toutefois, cela ne signifie pas que la question de savoir quel est acteur étatique qui doit avoir le dernier mot soit réglée. La tendance doctrinale et jurisprudentielle penche en faveur du juge à qui l'on accorde une plus grande confiance lorsqu'il s'agit de choisir les orientations normatives qui auront préséance en droit canadien. Toutefois, le débat reste encore ouvert sur la question de savoir si la discrétion du juge doit être limitée par des principes du droit constitutionnel canadien (et, si oui, lesquels?). Entre les perspectives de Knop (discrétion non limitée) et Van Ert (discrétion limitée par un équilibrage de principes prédéterminés), une troisième voie se dessine dans la doctrine canadienne. S'appuyant sur l'arrêt *Baker*,

Dyzenhaus et Walters estiment que le juge doit donner préséance aux normes relatives à la protection des droits de la personne tel que prescrit par la constitution de common law.

Il est encore trop tôt pour affirmer l'existence d'une pensée achevée chez les juges de la Cour suprême à cet égard, mais l'arrêt *Baker* a jeté des assises qui serviront à la construction d'un nouveau rapport entre le droit international et le droit interne. Certes une théorie compréhensive et mieux articulée reste à formuler, mais trois jalons pourrait rallier les points de vue des uns et des autres : 1. la perspective strictement formaliste véhiculée par l'approche dualiste ne joue plus nécessairement un rôle de premier plan; 2. le contenu de la norme internationale est dorénavant un facteur dont il doit être tenu compte lors de l'analyse de l'effet du droit international en droit interne. 3. le droit international des droits de la personne constitue une catégorie de normes pour lesquelles la perspective dualiste est appelée à jouer un rôle de second plan. Ces jalons soulèvent, bien sûr, des interrogations qui vont au-delà de cette recherche : Quelle est l'étendue de la catégorie des droits de la personne? Comprend-elle le droit international relatif à la santé, la sécurité et l'environnement (*Spraytech*[69])? Le cas échéant, comment justifier le même traitement de ces normes sur le plan constitutionnel? Doit-on opposer le droit international économique à ces autres normes? Faudrait-il formuler un cadre analytique adapté à chaque catégorie de normes? Comment déterminer les fondements constitutionnels qui auront préséance lors de chacune de ces analyses?

Ces quelques questions montrent l'ampleur des travaux qui restent à réaliser afin de nourrir la réflexion sur les enjeux liés à la juxtaposition de systèmes juridiques dont les points de rencontre se réduisent, bien souvent, à peu de chose. Malgré les difficultés qui s'accumulent, le recours aux normes internationales demeure un projet légitime, car il comporte un avantage non négligeable sur le plan du développement du droit canadien. En effet, le sentiment diffus qui se dégage lorsqu'on observe l'évolution des deux systèmes juridiques est que le droit canadien est, à bien des égards, à la remorque du droit international. Le désenchantement à l'égard de nos propres institutions politiques y est sans doute pour quelque chose, car notre emprise sur le renouvellement des idées et des projets sociaux

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[69] *114957 Canada Ltée (Spraytech, Société d'arrosage)* c. *Hudson (Ville)*, précité, note 11.

semble paralysée par différents facteurs (le déficit démocratique, la qualité de nos représentants, la pesanteur des procédures, la lenteur des réformes et innovations, etc.). Faute de remède et peut être aussi faute de volonté pour y arriver, nous avons passivement assisté au déplacement des centres de pouvoir vers les institutions internationales et autres organismes d'envergure internationale. Ce changement peut non seulement expliquer (du moins en partie) la capacité des acteurs internationaux à renouveler le droit international de telle sorte qu'il puisse répondre aux nouvelles réalités du monde contemporain, mais également offrir une justification à l'intégration de ce droit dans notre système juridique lorsque les acteurs étatiques sont d'avis que la norme internationale constitue une représentation symbolique valide des valeurs et aspirations des Canadiens[70]. En adoptant la prémisse selon laquelle le droit étatique et international partagent des fondements communs et sont, par conséquent, intégralement lié pour des raisons qui ne peuvent pas être expliquées par la volonté législative, la toile de fond interprétative des juges devient plus riche et plus nuancée[71]. Cette prémisse permet aussi de concevoir autrement le rôle de l'État-nation. Elle rend possible l'idée d'un concept de « souveraineté différenciée et polycentrique »[72] où « différents centres de pouvoir, à

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[70] A. BRUDNER, *loc. cit*., note 64, 225-226; David HELD, « Law of States, Law of Peoples: Three Models of Sovereignty », (2002) 8 *Legal Theory* 1.

[71] M.D. WALTERS, *op. cit*., note 62, p. 10. Il cite Murray HUNT, *Using Human Rights Law in English Courts*, Oxford, Hart Publishing, 199, p. 12-17.

[72] Le concept « polycentrique » est entré dans le vocabulaire de la Cour suprême. Elle l'utilise dans le cadre de l'analyse pragmatique et fonctionnelle servant à déterminer la norme de contrôle applicable aux décisions de l'Administration publique. La Cour s'en sert pour appuyer le point de vue selon lequel « la nature du problème n'exige pas l'application stricte de règles juridiques ni l'interprétation de la loi, mais plutôt une analyse éminemment contextuelle et polycentrique. » : *Chamberlain* c. *Surrey School District No. 36*, [2002] C.S.C. 86, 20 décembre 2002. Elle l'utilise aussi pour qualifier certaines décisions de « polycentriques », c'est-à-dire lorsqu'il s'agit de concilier les intérêts de différents groupes dans le cadre d'un processus décisionnel administratif : *Dr. Q* c. *College of Physicians and Surgeons of British Columbia*, [2003] CSC 19, par. 30, 31 et 37; *University Trinity Western* c. *British Columbia College of Teachers*, [2001] 1 R.C.S. 772, par. 15; voir aussi : *Pezim* c. *Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches)* c. *Southam Inc.*, [1997] 1 R.C.S. 748. La Cour a également fait référence à la nature polycentrique de la négociation de conventions collectives dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, 418. Certaines décisions administratives ne possèdent pas ce caractère polycentrique : *Barrie Public Utilities* c. *Assoc. canadienne de télévision par câble*, [2003] CSC 28; *Pushpanathan* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, précité,

l'échelle locale, nationale, multinationale, continentale ou internationale, se partageraient les tâches, selon les types de problèmes qu'il s'agit de maîtriser. »[73] L'État-nation peut ainsi être conçu « comme un lieu, parmi d'autres, d'autolégislation des citoyens »[74].

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note 11, par. 48, *Baker*, précité, note 10, par. 55; *Chieu* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, par. 26.

[73] Stéphane COURTOIS, « Droits individuals ou droit des peoples? », document présenté au soutien d'une conférence du Colloque sur les normes internationales au 21e siècle, Aix-en-Provence, 11-14 septembre 2003, p. 11 du manuscrit. Il cite au soutien de cette idée : D. HELD, *op. cit*., note 62, p. 27; Michael KEATING, « Nations without States: The Accomodation of Nationalism in the New State Order »; Thomas POGGE, « Cosmopolitanism and Sovereignty », (1992) 103 *Ethics* 48, 58 et suiv.; dans M. KEATING et J. McGARRY (dir.), *Minority Nationalism and the Changing International Order*, Oxford, Oxford University Press, 2001, p. 19-43.

[74] S. COURTOIS, *id.*, p. 11.

Citizen Participation and Peaceful Protest: Let's Not Forget APEC

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The fault, dear Brutus, is not in the stars, [b]ut in ourselves…[1]

Whether we jealously guard the prescription that our constitutional rights as citizens to participate in our political futures through peaceful protest can only be curbed by such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[2] is ultimately the fundamental issue addressed in this paper. Put simply, can our post-September 11th legislative initiatives and law enforcement responses—put in place in the name of security—be justified as "reasonable limits" on citizens' rights to protest actively the actions of their governments in a "free and democratic society"; or can they only be justified as reasonable limits in a society that measures these limits by yardsticks characterized by a palpable collective sensibility of fear, insecurity and overwhelming government control?

To address these questions, this paper will be divided into four main sections. After this introductory section, I discuss—in Part II—the RCMP commission that looked into complaints made in connection with the 1997 APEC Summit in Vancouver. This commission—having addressed head-on the tension between citizens' *Charter* rights to protest against government action on public property and the authority of police to limit such protests—provides a useful tool for evaluating security responses in the context of current peaceful protest. Next, in Part III, I discuss our current collective sensibility of fear that—in my view—acts to collapse the important distinction between protesters and terrorists, by militating against full opportunities for citizen participation and peaceful protest. In Part IV, with this backdrop of fear, I look at the landscape of citizen participation and peaceful protest in the context of post-September 11th

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1 W. Shakespeare, *Julius Caesar*, Act 1, Sc. 2, in W. Harness (ed.), *Shakspeare's [sic] Dramatic Works*, vol. 7 (London: J.F. Dove, 1830) at 9.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1 [hereinafter the *Charter*].

anti-globalization protests in Canada. Specifically, I use as an example police responses to the 2002 G8 Summit in Kananaskis, Alberta. In Part V, the paper looks at *Charter* rights to free expression and the obligations that, in my view, we as Canadians have to allow for broader and more meaningful opportunities for expression than those afforded citizens in Kananaskis. Several counter-arguments are also addressed in this part of the paper. Finally, the paper finishes, in Part VI, with some concluding observations.

I. APEC

On July 31, 2001, the Honourable Commissioner Ted Hughes, Q.C. released his interim report[3] following the public hearing[4] into the complaints made in connection with the organization and policing of the 1997 APEC conference in Vancouver, B.C.[5]

A. Background[6]

The practice of APEC has traditionally been to hold its annual meetings in remote, relatively isolated locations to promote the atmosphere of a "retreat".[7] In 1997, the annual conference was held at

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3 Commission for Public Complaints Against the RCMP, *RCMP Act*—Part VII, Subsection 45.45(14); *Commission Interim Report Following a Public Hearing Into the complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C. in November 1997 at the UBC Campus and at the UBC and Richmond detachments of the RCMP*, File No. PC 6910-199801 by Ted Hughes (Ottawa: CPC RCMP, July 31, 2001) [hereinafter *APEC Interim Report*].

4 The "APEC Inquiry".

5 The November 1997 APEC—Asia Pacific Economic Cooperation—Conference involved delegates from 18 Pacific Rim economies who met in Vancouver to discuss economic issues of mutual interest to the participant countries. See *APEC Interim Report*, *supra* note 3 at 10.

6 I have discussed the APEC Inquiry elsewhere. See *e.g.* T.C.W. Farrow, "Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time" (2003) 28 Queen's L.J. 665 at 672-674 ["Negotiation, Mediation, Globalization Protests and Police"]. See also W.W. Pue, "Executive Accountability and the APEC Inquiry: Comment on Ruling on Applications to Call Additional Government Witnesses" (2000) 34 U.B.C. L. Rev. 335; W.W. Pue, "The Prime Minister's Police? Commissioner Hughes' APEC Report" (2001) 39 Osgoode Hall L.J. 165; W.W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000).

7 *APEC Interim Report*, *supra* note 3 at 57, 75, 77.

several locations in Vancouver, B.C. including the University of British Columbia.[8] The license agreement between the federal government and UBC—providing for how, where and when the event would take place—contemplated the exercise of "lawful protest and… free speech".[9] However, according to Commissioner Ted Hughes, notwithstanding this provision, the result was a location that looked much like a "fortress".[10]

During the days leading up to, and on the final day of the Summit, there were a number of forms of protest on the UBC campus.[11] The RCMP, charged with the duty of keeping the entire event secure, responded to these protests with various policing techniques, including the use of force, pepper spray, detention and strip searches.[12] As a result of these actions, 52 formal complaints were made by protesters.[13] Those complaints resulted in an inquiry being conducted under the *Royal Canadian Mounted Police Act*.[14]

B. APEC Inquiry

The Commission approached the entire issue—following the lead of the complainants' submissions—by looking at whether there was an "unprecedented RCMP crackdown" on protest at the Summit.[15] It found

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8 *Ibid*. at 10-11.

9 Pursuant to s. 6.3 of the agreement, it was provided that "[t]he parties undertake not to impede any lawful protest and the exercise of free speech outside the Properties and other designated areas, as determined by the RCMP in conjunction with UBC." See *ibid*. at 34.

10 *Ibid*. at 72.

11 The protests included: (1) a tent city and a small break-away group of tents were set up; (2) the Tibetan flag was raised from the Graduate Student Society building flag pole; (3) a speak-out rally was organized; (4) a protest and symbolic arrest of Indonesia's President Suharto was arranged; (5) students attended at and pushed over the security fence; and (6) the three access and exit routes to the meetings were blocked. See *ibid*. at 87, 109, 128, 220, 242, 290, 301.

12 *Ibid*. at 5-9.

13 *Ibid*. at 5-9, 148-430, Appendix III.

14 R.S. 1985, c. R-10, s. 45.29(1) [hereinafter the *RCMP Act*]. See *APEC Interim Report*, *supra* note 3 at 2. The terms of reference of the APEC Inquiry were essentially three-fold. Specifically, they were to look into and report on: (1) the events at the APEC Summit between 23-27 November 1997; (2) whether the conduct of the RCMP was appropriate, as defined under the RCMP Code of Conduct, found in s. 37 of the *RCMP Act*; and (3) whether the conduct of the RCMP was consistent with s. 2 of the *Charter*. See *APEC Interim Report*, *supra* note 3 at 3, 38-45.

15 *APEC Interim Report*, *ibid*. at 46.

that there was a crackdown, in that some instances of RCMP conduct were not appropriate, and further, some instances were not consistent with section 2 of the *Charter*.[16]

The Commission then formulated its analysis by looking at the two most likely explanations for the crackdown, as suggested by the complainants' counsel: (1) below standard policing; and/or (2) improper federal government pressure to curtail demonstration, primarily to facilitate the attendance of Indonesia's President Suharto.[17] The exercise of looking into these explanations—involving 153 witnesses, 710 exhibits and 40,000 pages of transcript over 170 days,[18] a process that "cost the taxpayers nearly $10 million"[19]—primarily focused on the second of these possible explanations. The balance focused on the first.[20]

The Commission, in its final analysis, found substandard policing to be the explanation for the RCMP's crackdown,[21] not improper government pressure.[22] Based on this analysis, the Commission concluded with a number of recommendations for future protest events.[23] On September 7,

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16 *Ibid*. The APEC Inquiry largely focused on protest rights—to free expression—found in s. 2(b) of the *Charter*.

17 *Ibid*. at 47.

18 *Ibid*. at 3.

19 *House of Commons Debates* No. 109 (November 5, 2001) (P. Venne), online: http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/109_2001-11-05/han109_1105-E.htm.

20 *APEC Interim Report*, *supra* note 3 at 47. To analyze the RCMP's conduct, the Commission essentially formulated its analysis by: (1) grouping the 52 complaints into 17 complaint categories (see *ibid*. at 148-430); (2) looking at the events underlying those complaints and the RCMP's response; (3) consistent with its terms of reference (see *supra* note 14), evaluating the response as to its reasonableness; and (4) evaluating the response in terms of its consistency or inconsistency with s. 2 of the *Charter*.

21 *Ibid*. at 82-445. Not surprisingly, Commissioner Hughes concluded by finding that some of the RCMP's conduct was appropriate and some of it was not. Further, he made similar findings with respect to *Charter* violations. See *ibid*. at 431-440.

22 *Ibid*. at 102. There are in my view, however, several Commission determinations that only questionably support this conclusion. See my discussion on this point in "Negotiation, Mediation, Globalization Protests and Police", *supra* note 6 at 673, no. 19.

23 First, the Commissioner emphasized the importance of making room for peaceful protest, and for promoting the practice of the RCMP working cooperatively with protesters and protest organizers. See *APEC Interim Report*, *supra* note 3 at 446-448. Second, notwithstanding his rejection of the improper government intervention explanation for the "crackdown", Commissioner Hughes did make some

2001, RCMP Commissioner Giuliano Zaccardelli responded to the *APEC Interim Report*.[24] The final report of the APEC Inquiry was released on 25 March 2002.[25]

C. Making Room for Protest

In the APEC Interim Report, Commissioner Hughes acknowledged that the Canadian government and the RCMP may be justified in using public protest restrictions, in a "narrow sense", for the protection of visiting heads of state in the context of international meetings, including, for example, avoiding "violent physical assault or a more symbolic act, such as a flying pie".[26] Other restrictions were also acknowledged by Commissioner Hughes to prevent visiting leaders from being "grossly humiliated" by "illegal acts".[27] However, other than these limited circumstances, according to Commissioner Hughes*:*

> "[N]either the federal government nor the RCMP may curtail political criticism by protesters. The right to express political views lies at the very core of the freedom of expression provided for in the Charter. The fact that a visiting leader may be merely upset or angered by the expression of contrary political views and criticism by Canadians does not justify the suppression of such expression."[28]

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recommendations as to police independence that go to the issue of proper government influence: *ibid*. at 451-452. Third, he focused on a need for police to get adequate legal advice on issues that might invoke the *Charter* and other rights of citizens: *ibid*. at 448. Finally, he also made a number of recommendations for future policing operations: see *e.g. infra* notes 26-30 and surrounding text.

[24] G. Zaccardelli, *RCMP Commissioner's Response to the Interim APEC Report* (Ottawa: September 7, 2001), online: RCMP homepage http://www.rcmp-grc.gc.ca/news/apec_comm_e.htm.

[25] Commission for Public Complaints Against the RCMP, *RCMP Act*—Part VII, subsection 45.46(3), *Chair's Final Report Following a Public Hearing into the complaints relating to RCMP conduct at events that took place at the UBC campus and the Richmond Detachment during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997*, File No. PC 6910-199801 (Ottawa: CPC RCMP, March 25, 2002) (Chair: Shirley Heafey) [hereinafter *APEC Final Report*, and, together with the *APEC Interim Report*, the *APEC Report*].

[26] *APEC Interim Report*, *supra* note 3 at 54.

[27] *Ibid*.

[28] *Ibid*. See also generally *ibid*. at 38-45.

As a result, in his recommendations regarding "policing public order events", Commissioner Hughes advocated for an express "opportunity for protest":[29]

When the RCMP is called upon in the future to police public order events, the leadership of the Force should ensure that:

- generous opportunity will be afforded for peaceful protesters to see and be seen in their protest activities by guests to the event; and
- no attempt will be made to use a university campus as the venue for an event where delegates are to be sequestered and protected from visible and audible signs of dissent.[30]

Similar conclusions were reached by the New Zealand Justice and Electoral Committee that was set up to look into police treatment at and around the 1999 APEC Summit in New Zealand of demonstrators protesting the visit of Jiang Zemin, President of the People's Republic of China, and that country's involvement in Tibet. In its December 2000 report,[31] the committee recognized that "freedom of expression and freedom of peaceful assembly are the starting point for the Police in making operational decisions about policing protests."[32] This New Zealand APEC Report was favourably referred to by Commissioner Hughes in the *APEC Interim Report*.[33]

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29 *Ibid*. at 446.

30 *Ibid*.

31 *Inquiry into matters relating to the visit of the President of China to New Zealand in 1999* (December 2000), accessible online: http://216.239.57.104/search?q=cache:5vPmAsJzlW4J:www.gp.co.nz/wooc/i-papers/i7a-china.html+Tim+Barnett+and+%22Justice+and+Electoral%22+and+APEC&hl=en&ie=UTF8 [hereinafter *New Zealand APEC Report*]. The specific terms of reference of the *New Zealand APEC Report* were:

> "To examine the handling of demonstrations held during the visit of the President of China to New Zealand in 1999, and the impact of those events on the civil liberties and fundamental rights of New Zealanders. In particular… assessing whether there are enough protections for peaceful and lawful protest; and… assessing whether the powers of government pertaining to the maintenance of public order are appropriate; and… assessing the procedures for the exercise of those powers." *Ibid*. at 7.

32 *Ibid*. at 5-6.

33 *APEC Interim Report*, *supra* note 3 at 54.

So what happened between the issuing of the *APEC Interim Report*, which recommended a narrow scope for limiting future peaceful expression, and the virtual elimination of meaningful protest that occurred at the 2002 Alberta G8 Summit? It is to that question to which I will now turn.

II. COLLECTIVE SENSIBILITY OF FEAR

A. Responses to September 11th

Less than two months after the *APEC Interim Report* was released, the September 11th terrorist attacks in the United States occurred. Almost immediately, the massive legislative, law enforcement and military powers of the Unites States,[34] Canada,[35] numerous other nations[36] and the United

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[34] In the United States, for example, on September 18, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks…" *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001). Shortly thereafter, Congress passed significant and far-reaching anti-terror legislation. See *e.g. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter *USA Patriot Act*]. For general commentary, see *e.g.* Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (St. Paul, MN: West Group, 2003) [hereinafter *Anti-Terrorism and Criminal Enforcement*]; D.J. Musch, *Balancing Civil Rights and Security: American Judicial Responses Since 9/11* (Dobbs Ferry, NY: Oceana Publications, Inc., 2003) [hereinafter *Balancing Civil Rights and Security*].

[35] See *e.g. Anti-terrorism Act*, S.C. 2001, c. 41; *Criminal Code*, R.S.C. 1985, c. C-46, s. 2, 83.01-83.33. In addition to these legislative initiatives, as the Canadian government has outlined, "Following September 11th, the Government moved quickly to implement a range of national security initiatives in both legislative and operational areas. In December 2001, the Federal Budget allocated $7.7 billion over the next five years to keep Canada safe, terrorists out and the border open." Government of Canada, "Safety and Security for Canadians", Government of Canada homepage, online: http://canada.gc.ca/wire/2001/09/110901-US_e.html. For further summary information on Canada's security budget, see Department of Finance Canada, "Budget 2003 Supports Social and Economic Agenda While Maintaining Balanced Budgets", online: http://www.fin.gc.ca/news03/03-010e.html#Highlights.

[36] In the U.K., for example, see *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24. For general commentary, see *e.g.* Y. Alexander & E.H. Brenner, eds., *The United Kingdom's Legal Responses to Terrorism* (London: Cavendish Publishing Limited, 2003) [hereinafter *The United Kingdom's Legal Responses to Terrorism*]. For a useful collection of Canadian and international anti-terror initiatives, see Jurist, "World Anti-Terrorism Laws", online: http://jurist.law.pitt.edu/terrorism/terrorism3a.htm.

Nations[37]—the "full resources of our intelligence and law enforcement communities"[38]—were unleashed in the name of security and anti-terror.[39]

B. "Everything Changed"

From that day forward, there has been precious little mention of the APEC Inquiry or the resulting findings.[40] In my view, the *APEC Report* has largely been swept off the radar screen by the irresistible wave of anti-terror initiatives and fear that have rolled over our collective political communities and consciousness. Put simply: the *APEC Report* was then; this is now. The reason: people generally believe that the world has changed since September 11th.

Political statements from high-level political figures constantly reinforce this sentiment. For example, according to press materials from President George W. Bush, "The attacks of September 11th changed America".[41] Similarly, according to recent statements from former British

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37 See *e.g.* SC Res. 1373, UN SCOR (September 28, 2001).

38 US President George W. Bush, "Statement by the President and His Address to the Nation" (September 11, 2001), online: http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html.

39 This paper does not purport to address in a comprehensive manner our post-September 11th legislative, law enforcement and judicial responses. I have looked briefly at these responses elsewhere. See *e.g.* T.C.W. Farrow, "Law & Politics After September 11th: Civil Rights & The Rule of Law" (2003) 35 Hosei Riron J. of L. and Pol. 163 at 165-167 [hereinafter "Law & Politics After September 11th"]. For other, more fulsome examinations of these post-September 11th responses, see *e.g.* R. Chesney, "Civil Liberties and the Terrorism Paradigm: The Guilt by Association Critique" (2003) 101 Mich. L. Rev. [forthcoming], "Responding to Terrorism: Crime, Punishment, and War" (2002) 115 Harv. L. Rev. 1217. For a more general discussion on the aftermath of September 11th, see *e.g.* R. Jervis, "An Interim Assessment of September 11: What Has Changed and What Has Not" (2002) 117 Pol. Sci. Q. 37. See also D. Daubney et al., eds., *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Éditions Thémis, for the Canadian Institute for the Administration of Justice, 2002); R.J. Daniels, P. Macklem & K. Roach, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) [hereinafter *The Security of Freedom*] *The United Kingdom's Legal Responses to Terrorism*, *supra* note 36; *Anti-Terrorism and Criminal Enforcement*, *supra* note 34; *Balancing Civil Rights and Security*, *supra* note 34.

40 The *APEC Final Report*—setting out the findings and recommendations as the Chair "sees fit" from the *APEC Interim* Report—was released on March 25, 2002. See *APEC Final Report*, *supra* note 25 at 1.

41 The White House, "President's Biography", online: http://www.whitehouse.gov/president/gwbbio.html.

Prime Minister Margaret Thatcher, as a result of the "horror of Sept. 11", the United States "will never be the same again."[42]

Similar arguments are made from a legal perspective. For example, during an October 2001 interview, Anne McLellan—then Canada's Minister of Justice—stated that the notion of "reasonable limit" in section 1 of the *Charter* has shifted since September 11th.[43] Similarly, in the context of discussing national security and arrest powers, John Manley—then Canada's Minister of Foreign Affairs and chair of an ad hoc Cabinet committee on security and anti-terrorism—was similarly reported as stating that "Either nothing changed on Sept. 11 or everything changed".[44]

Many people agree with and have applauded these political and legal responses. As one Canadian report indicated, "two out of every three… [Canadians] believed fighting terrorism outweighed the need to protect individual rights and the due process of law".[45] In the US, prior to the recent events in Iraq, a September 2002 CNN-Gallop poll gave President Bush a 66 percent approval rating, with "most Americans saying he has achieved just the right balance between protecting their treasured civil liberties and fighting terrorism."[46] Others, rejecting the notion that

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42 M. Thatcher, "Advice to a Superpower" *The New York Times* (February 11, 2002), online: http://www.nytimes.com/2002/02/11/opinion/11THAT.html?.

43 S. McCarthy, "The War on Terror: Anne McLellan's New Ideals" *The Globe and Mail* (October 22, 2001) A7.

44 L. Chwialkowska, "Police Get Vast Power of Arrest: 'Deter, Disable, Dismantle'" *National Post* (October 16, 2001) A1, online: http://groups.yahoo.com/group/tt-watch/message/6777?source=1. See also I. Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in *The Security of Freedom*, *supra* note 39 at 111. Even the title of the CIAJ Conference at which this paper was presented—see *supra* note *—contemplates the possibility of a changed legal society through a "New Rule of Law".

45 D. Small, "Backlash, Terrorism & Civil Liberties" (2001) 10 National 15 at 18.

46 R. MacGregor, "Jefferson's Words Treasured by Patriots, Twisted by Terrorists" *The Globe and Mail* (September 7, 2002) A11. For a discussion of opinion polls on September 11th and their aftermath, see *e.g.* L. Huddy, N. Khatib & T. Capelos, "Reactions to the Terrorist Attacks of September 11, 2001" (2002) 66 Pub. Op. Q. 418. See also generally R.P. Hart, S.E. Jervis & E.T. Lim, "The American People in Crisis: A Content Analysis" (2002) 23 Pol. Psych. 417; A.F. Healy et al., "Terrorists and Democrats: Individual Reactions to International Attacks", *ibid.* at 439; V.A. Chanley, "Trust in Government in the Aftermath of 9/11: Determinants and Consequences", *ibid*. at 469; L. Huddy et al., "The Consequences of Terrorism: Disentangling the Effects of Personal and National Threat", *ibid*. at 485; D.J. Schildkraut, "The More Things Change… American Identity and Mass and Elite Responses to 9/11", *ibid*. at 511.

everything has changed,[47] have criticized our collective response as a "deeply disturbing" move unlawfully to infringe upon long-standing and fundamental rights and liberties.[48]

Regardless with which side of the debate one agrees, it is certainly clear, in my mind, that our response—reminiscent of the Kennedy administration's nuclear fallout shelter program during the 1961 Berlin crisis—is largely the result of a widespread collective sense of insecurity and fear.[49] People are scared. And it is with this mindset that we are responding to current world events.[50] This sense of collective fear was recently commented on by Margaret Atwood when discussing post-September 11th America:

> "You're gutting the Constitution. Already your home can be entered without your knowledge or permission, you can be snatched away and incarcerated without cause, your mail can be spied on, your private records searched… I know you've been told all this is for your own safety and protection, but think about it for a minute. Anyway, when did you get so scared? You didn't used to be easily frightened."[51]

Unfortunately, I think Atwood is right. But regardless of whether we are, in the end, motivated by fear or not, it is also clear that our responses to the tragic events of September 11th have resulted in significant restrictions on freedom of movement, speech and assembly. Further, the

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47 Kent Roach, for example, has recently argued that "the idea that September 11 changed everything must be rejected". K. Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at para. 82. See also K. Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in *The Security of Freedom*, *supra* note 39 at 131.

48 American Civil Liberties Association ("ACLU"), "Keep America Safe and Free", online: ACLU homepage http://www.aclu.org/SafeandFree/SafeandFreeMain.cfm. See also ACLU, "Freedom Under Fire: Dissent in Post-9/11 America", online: ACLU homepage http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12666&c=206.

49 President Kennedy reportedly believed, in retrospect, that his 1961 call for a national fallout shelter program had overexcited people. See A.M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (Boston: Houghton Mifflin Company, 1965) at 723, 748.

50 I am grateful to Patricia Hughes, Dean, Faculty of Law, University of Calgary, for comments on this aspect of my argument.

51 M. Atwood, "A Letter to America" *The Globe and Mail* (March 28, 2003) A17 [hereinafter "A Letter to America"].

argument that the world is a "changed" place after September 11th has acted to cloud the more basic question of how properly to balance liberty and security—in the context of citizens actively, yet peacefully, participating in their political futures—in a free and democratic society. As such, we have—through our fear—largely collapsed the difference between activists and terrorists. It is to this issue, discussed through the lens of recent anti-globalization protests, to which I will now turn.

III. CITIZEN PARTICIPATION AND PEACEFUL PROTEST

A. Anti-Globalization Protests

For the past 10 or 15 years, and now most famously since the Seattle anti-WTO protests in 1999, there has been a growing movement of criticism against current globalization trends. This movement, made up of a vast array of individual and group interests, has been loosely characterized as the "anti-globalization movement".[52] In 1999, prior to Seattle, it was estimated that the International Civil Society included approximately 800 organizations from more than 75 countries.[53] That number has since increased.[54]

Following Seattle, significant protests in connection with world trade and other international meetings have been organized in a number of different cities across the globe, including Davos, Washington, Ottawa, Milan, Québec,[55] New York, Tokyo, and elsewhere. These protests,

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[52] For recent discussions of current anti-globalization protests, see *e.g.* T.C.W. Farrow, "Reviewing Globalization: Three Competing Stories, Two Emerging Themes, and How Law Schools Can and Must Participate" (2003) 13 Meikei L. Rev. 176, trans. into Japanese by M. Kuwahara, (2003) 44 Aichigakuin L. Rev. 29 [hereinafter "Reviewing Globalization"]; "Negotiation Mediation, Globalization Protests and Police", *supra* note 6 at 670-672. See also M. Barlow & T. Clark, *Global Showdown: How the New Activists Are Fighting Global Corporate Rule* (Toronto: Stoddart Publishing Co. Limited, 2002).

[53] Members of the International Civil Society, "Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations", online: http://www.twnside.org.sg/title/wtomr-cn.htm.

[54] See *e.g.* "The Growth in the Number of NGOs in Consultative Status with the Economic and Social Council of the United Nations", online: City University London homepage http://www.staff.city.ac.uk/p.willetts/NGOS/NGO-GRPH.HTM#data.

[55] For a judicial discussion of security measures at the 2001 Québec Summit, see *Tremblay* v. *Québec (Procureur Général)*, [2001] J.Q. No. 1504 (C.A.), online: QL (JQ), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 231, online: QL (SCCA).

loosely speaking, primarily involve objections to current and dominant neo-liberal trends of free trade, international capital flow and strong corporate influence. A primary theme of the protest movement is that the current balance of political power and world economic arrangements leads to a wide disparity of wealth and lack of equality across world populations. The approach of these protests has largely involved direct and active street demonstrations and the widespread use of the Internet. For purposes of this paper, it is important to recognize that, while there has been some violence, the vast majority of protests have been peaceful. These protests have also become popular media targets.[56]

B. 2002 G8 Summit in Kananaskis

In the context of public anti-globalization demonstrations in Canada following the events of September 11th, national security and the threat of terrorism have been used as justifications for deploying significant police and military units around these meetings of world leaders. For the purposes of this paper, I will look specifically at the June 2002 G8 Summit.

At that Summit—in Kananaskis, Alberta—there was a region-wide security perimeter set up making it essentially impossible for protesters to get anywhere near the international leaders and trade delegates. Even in Calgary, more than 100 kilometers away, protest zones and access to public areas were severely restricted. The cost of these heavy police and military security precautions in place surrounding the entire 2002 G8 Summit was estimated at between $300 and $500 million.[57] The reason for

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[56] For further discussions of post-September 11th Canadian anti-globalization protests, including the November 2001 G20 Summit in Ottawa and the June 2002 G8 Summit in Alberta, see "Negotiation, Mediation, Globalization Protests and Police", *supra* note 6 at 674-688; "Reviewing Globalization", *supra* note 52 at 192-204; "Law & Politics After September 11th", *supra* note 39 at 176-178.

[57] T. Maloney, "Deputy Chief Defends $34.3M Tab" *Calgary Herald* (June 26, 2002) A6; T. Maloney, "Federal Ministers Showered With Catcalls" *Calgary Herald* (June 26, 2002) A7. For a summary of the 2002 Alberta G8 security initiatives, see *e.g.* RCMP, "G8 Summit Security", online: http://www.g8summitsecurity.ca/g8/news/nr-02-02.htm#newsrelease; Government of Alberta, "Security", online: http://www.gov.ab.ca/home/g8/Display.cfm?id=4. See also M. Reid, "Police Steps Up Security Measures: Extra Fencing, Water Cannons in Place" *Calgary Herald* (June 22, 2002) A1.

As it turned out, the protests in Calgary and the neighboring areas surrounding the G8 Summit in Kananaskis were peaceful and were carried off without major incident. As one report indicated, "Protesters preferred to party rather than fight… The protesters

these precautions: security, primarily including security against terrorist attacks.[58] The result of these precautions: a virtual shut-down of any meaningful debate or protest in the vicinity of the leaders and other powerful decision-makers.[59]

This lack of opportunity for meaningful dissent and protest was troubling in itself.[60] In my view, the police lock-down of the Kananaskis region was a clear violation of the rights to free speech and expression that are enshrined in section 2 of the *Charter*.[61] There is no way in my mind, on any reading of section 1 of the *Charter*, that a 100 km region-wide security perimeter could be a justified restriction on peaceful dissent and protest.

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danced and pounded drums, but were otherwise peaceful." S. Crowson, "Party Breaks Out at 'Showdown'" *Calgary Herald* (June 26, 2002) A1. See also J. Mahoney, "Calgary Protests Get Off to Peaceful Start" *The Globe and Mail* (June 24, 2002) A8; D. Walton & L. Nguyen, "So Long, Seattle: Protests Turn Polite" *The Globe and Mail* (June 27, 2002) A1; E. Poole et al., "Polite Protesters Give Peace a Chance in Downtown Streets" *Calgary Herald* (June 27, 2002) A7.

58 The reason for extensive security was also, at least arguably in part, to protect the environmentally sensitive area—Kananaskis Country—in which the Federal Government decided to host the Summit. While, in my view, the Government purposely chose and used the nature of the area as a strategic tool to bolster its argument that a shut down of the region was warranted, there is no doubt that the Kananaskis/Canmore/Banff regions are certainly environmentally sensitive areas. For example, even as I delivered this paper at the Participatory Justice Conference—see *supra* note *—deer were walking and grazing just feet away outside the conference room window. I am grateful to Constance D. Hunt, Justice, Alberta Court of Appeal, for comments on the issue of the environmental sensitivity of the Kananaskis region and the fact that the decision to hold the Summit in that region was ultimately made by the Federal Government, not the RCMP.

59 As one report leading up to the 2002 G8 Summit indicated, "… officials tasked with managing the nuisance of protesters have all but ensured that their part in this grandiose theatre does not happen at all… The police have done a splendid job of marginalizing the protesters." B. Cooper & D. Bercuson, "Protest Fest? Not at Kananaskis" *National Post* (May 23, 2002), online: http://www.nationalpost.com/scripts/prin...nter.asp?f=stories/20020523/312656.html.

60 I attended the protest sites in Calgary during the 2002 G8 Summit and observed, first hand, many of the security initiatives that were in place.

61 It also signaled a clear change from previous G8 meetings in Canada. As Prime Minister Chrétien reportedly indicated at the June 2003 Evian G8 meeting, commenting fondly on the 1995 G8 meeting in Halifax, there the leaders were able to walk "into the crowds and shake hands with people… The people were fabulous" and "we've not been able to repeat it" because of security concerns. Canadian Press, "Chrétien Marks 10th and Last G-8 Summit as PM", online: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1054655547437_68.

However, perhaps more troubling still is the chilling effect that the post-September 11th approach to demonstration zones has on any kind of meaningful public debate, dissent and protest. Increased police powers, through anti-terrorism initiatives and other law enforcement tools, now provide governments with wide powers to shut out protest and to investigate potential "terrorists".[62] As Bill Blaikie, New Democratic Party member of Parliament from Winnipeg-Transcona questioned prior to the 2002 G8 Summit with respect to military action and the resulting suppression of political protests: "I want to ask this government, what is it they've got against legitimate protesters who may not share their world view from time to time[?]"[63] Ultimately, these government powers and police actions—exemplified in the June 2002 shut-down of the Kananaskis area—have in my view largely silenced meaningful peaceful public protest.

C. Lessons From APEC

Returning now to the findings of the APEC Inquiry, Commissioner Hughes stated, in the recommendation section of the *APEC Interim Report*,[64] that:

> "The Vancouver APEC conference was an extraordinary event in Canadian policing but the evidence is clear that police in Canada and around the world will face increasing challenges as they are called upon to police international gatherings that attract growing dissent. Their role is to protect government leaders and officials and also to safeguard citizens' rights to lawful protest. As I have quoted Mr. Justice Doherty saying, in the Brown case: 'We want to be safe, but we need to be free.'"[65]

I think Commissioner Hughes was right: challenges raised by the number and diversity of voices that attend anti-globalization and other public protest events combined with the background of terrorism that has been foregrounded by the events of September 11th do create "increasing

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62 *Supra* notes 34-39.

63 CBC News Staff, "Don't Use Anti-terror Bill to Block G-8 Protests: Critics" *CBC News* (November 30, 2001), online: http://cbc.ca/stories/2001/11/30/blaikie_security011130.

64 *APEC Interim Report*, *supra* note 3 at 446-453.

65 *Ibid*. at 446, citing *Brown* v. *Durham Regional Police Force* (1998), 43 O.R. (3d) 223 at 251 (C.A.).

challenges" for government officials and police officers. There is no doubt that modern policing is a challenging business.[66]

Unfortunately, however, rather than following the recommendations of the APEC Commission, what we have done in Canada since September 11th in terms of policing public events—as exemplified by the June 2002 G8 Summit in Alberta—is largely, in my view, the opposite of what Commissioner Hughes recommended. Opportunity for active participation and protest—allowing protesters "to see and be seen" and avoiding locations that allow government officials to be "sequestered and protected from visible and audible signs of dissent"[67]—has not occurred. As the security arrangements for the 2002 G8 Summit in Kananaskis demonstrate, what has instead occurred has been a complete shut-down of meaningful public dissent in the name of securing public leaders from terrorist threats.

IV. OPENING UP DEBATE

A. Wide Latitude for Expression

It is an understatement to say that the Court has traditionally recognized the importance of free expression, and in particular, free political expression. As McLachlin C.J. and LeBel J. stated in *Retail, Wholesale and Department Store Union, Local 558* v. *Pepsi-Cola Canada Beverages (West) Ltd*:[68]

> "The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society… The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and conditions. It allows a person to speak not only for the sake of expression itself, but also to advocate change,

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[66] For a useful look at policing in the context of protests in Canada, see J. Esmonde, "The Policing of Dissent: The Use of Breach of the Peace Arrests at Political Demonstrations" (2002) 1 J. of L. & Equality 247.

[67] *APEC Interim Report*, *supra* note 3 at 54, 446. See further *supra* notes 29-30 and surrounding text.

[68] [2002] 1 S.C.R. 156.

> attempting to persuade others in hope of improving one's life and perhaps the wider social, political, and economic environment."[69]

Similarly, in the context of complaints made about police treatment of demonstrators at President George W. Bush's January 2001 inauguration, Kessler J. of the United States District Court for the District of Columbia stated, when considering the kind of speech at issue in the dispute:

> "we are considering the essence of First Amendment freedoms—the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.[70] This wide freedom to exchange ideas also includes—in the context of the anti-globalization movement—the freedom actively to criticize dominant world views and trends such as 'global capitalism' and 'corporate interests'".[71]

These rights to free expression are, in my view, of increased importance in an era when world leaders are debating not only trade restrictions and agreements, but more fundamentally, the future of nations, leaders and political regimes. Now, more than ever, we need the opportunity to debate and take seriously both according and dissenting opinions.[72]

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[69] *Ibid*. at 172-173. See further *Reference re: Secession of Québec* (1998), 161 D.L.R. (4th) 385 at 417 (S.C.C.), *Irwin Toy Ltd.* v. *Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 970. See also generally P.W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Scarborough, Ont.: Carswell, 1997) at 40-1–40-51.

[70] *International Action Center* v. *United States of America*, [2002] Civil Action No. 01-72 (D.C. Cir.) at 5, online: http://www.dcd.uscourts.gov/district-court-2002.html.

[71] *Lee* v. *City of Seattle*, [2001] Civil Action No. C01-1928P (W.D.W.) 1 at 3 [hereinafter *Lee*].

[72] Justice Gonthier recently stated that: "The new era of democratic rights and responsibilities into which the *Charter* has propelled us demands considerable effort on the part of every player in the Canadian democracy… we must make real and significant the enlightened participation of the public in fundamental debates that guide society… It is here that the roles of courts, Parliament and the media unite: in serving the public, as well as in creating public space where ideas can propagate and evolve." The Honourable Charles D. Gonthier (Main Address, The Honourable Charles D. Gonthier Benefit Dinner, CIAJ, Montréal, April 29, 2003) *CIAJ Newsletter* XIII: 2 (Summer 2003) 6 at 7.

Protecting our populations from the threat of terrorism is clearly important. However, peaceful protesters are not terrorists. They should not be treated as such.[73] Further, it is important to remember—when labeling "terrorists"—that, as the Supreme Court in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* acknowledged, "Nelson Mandela's African National Congress was, during the apartheid era, routinely labeled a terrorist organization, not only by the South African government but by much of the international community."[74]

Without leaving room for dissent and debate, we impoverish any chance for a fulsome consideration of all views at a time when political stakes are exceptionally high. Protest, debate and demonstration need not be feared; rather, they should be celebrated and encouraged by the majority, and at least vigorously protected by our courts.

B. Anti-Globalization and Beyond

There are several places—flashpoints—where these freedoms will likely clash "on the ground" with state interests of security in the context of anti-globalization and other public protests. These flashpoints potentially include: (1) injunctive relief challenging time, manner and place protest permit restrictions and denials;[75] (2) similar injunctive relief

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[73] For useful discussions on the treatment of dissent and protest in the post-September 11th era, see A.-G. Gagnon, "A Dangerously Shrinking Public Sphere" (September 2002) 23 Policy Options 18; L. Panitch, "Violence as a Tool of Order and Change: The War on Terrorism and the Anti-Globalization Movement", *ibid*. at 40; R. Morden, "Finding the Right Balance", *ibid*. at 45; A. Borovoy, "Protest Movements and Democracy", *ibid*. at 54.

[74] [2002] S.C.J. No. 3, online: QL (SCJ) at para. 95.

[75] In Canada, in June 2002, the Alberta Federation of Labour ("AFL") and the Canadian Civil Liberties Association challenged a Calgary City by-law invoked to prohibit an anti-globalization protest in a Calgary park during the 2002 G8 Summit. While the by-law was not enacted to protect against terrorism, it was used in the name of security primarily against terrorism. The challenge was settled following the permission by the City to use the park for peaceful demonstrations. See AFL, "AFL and Civil Liberties Association Launch Court Challenge to Defend Freedom of Assembly in Calgary City Parks" (News Release, June 24, 2002), online: http://www.telusplanet.net/public/afl/newsreleases/june2402.html. See also R. Rowland, "Security at G8; Watching on Three Fronts" *CBC News*, online: http://cbc.ca/news/features/g8/security.html.

In the US, see *e.g.* the November 2001 injunction granted by Pechman J., United States District Court, Western District of Washington at Seattle, ordering the City of Seattle to permit a WTO anniversary protest in Seattle's Westlake Park. *Lee*, *supra* note 71. For a report of the decision, see Z.D. Lyons, "N30 Lawsuit Against City

challenging the constitutionality of specific crowd control measures;[76] (3) surveillance tactics of police and investigative agencies;[77] (4) efforts by protesters to resist arrest;[78] (5) after-the-fact general challenges of police crowd control techniques;[79] and (6) complaints about illegal detentions of protesters.[80]

Further, the importance of this discussion is not limited to the anti-globalization movement. As the critics of recent anti-terror initiatives have made clear,[81] the protection of nations against the threat of terrorism has resulted in massive government restrictions on basic human rights and liberties. For example, after pointing to the prisoners being held by the US in Guantánamo Bay, Cuba, Russia's military involvement in Chechnya, and China's restrictions on Muslims—all largely in place in the name of terrorism—Mary Robinson "blasted governments for using terrorism [the 'T-word'] as an excuse to trample human rights… under the pretext of

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Continues in Federal Court" *The Settle Press* (January 3, 2002), online: www.seattlepress.com/print-9411.html.

76 *Tremblay* v. *Québec (Procureur Général)*, *supra* note 55.

77 Prior to complaints made by the ACLU, the New York City police reportedly attempted to collect information from arrested anti-war protesters on prior political activity. See *e.g.* W.K. Rashbaum, "Police Stop Collecting Data on Protesters' Politics" *The New York Times* (April 10, 2003), online: http://www.nytimes.com/2003/04/10/nyregion/10NYPD.html.

78 *Smith* c. *R.*, [2003] Q.J. No. 6525, online: QL (QJ) (Sup. Ct.), in which the appellant, a protester at the April 2001 Québec Summit of the Americas, was arrested—after refusing to remove a scarf—for resisting arrest.

79 In Canada, see *e.g.* the APEC Inquiry, above, Part II. In New Zealand, see *e.g.* the *New Zealand APEC Report*, *supra* notes 31-32. In the United States, several class actions have been launched in connection with police treatment of protesters at large anti-globalization and other anti-government rallies. For example, in connection with the April 2000 IMF-World Bank protests in Washington, D.C, see *Alliance for Global Justice* v. *District of Columbia* (US District Court for the District of Columbia, 01-CV-811) (amended complaint), online: http://www.justiceonline.org/a16/a16complaint.html. In connection with demonstrations at President George W. Bush's January 2001 inauguration, *see International Action Center* v. *United States* (US District Court for the District of Columbia, 01-CV-72). For a discussion of the case, in the context of an interlocutory discovery motion, see *International Action Center* v. *United States of America*, [2002] Civil Action No. 01-72 (D.C. Cir.), online: http://www.dcd.uscourts.gov/district-court-2002.html.

80 See *e.g. APEC Interim Report*, *supra* note 3 at 9.

81 See *e.g. supra* notes 47-48 and accompanying text.

fighting international terrorist groups."[82] Clearly these issues are of critical importance to all citizens, not simply to members of the anti-globalization movement or to members of traditional minority groups.

More specifically, other individuals and contexts that are potentially directly affected by this discussion—perhaps with modification[83]—include: (1) anti-poverty protests;[84] (2) abortion clinic protests;[85] (3) environmental protests;[86] (4) access to government officials;[87] (5) university students protesting higher tuition fees;[88] and (6) potentially many others.[89]

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82 CBC News Staff, "Outgoing UN Rights Chief Lashes US, Russia, China" *CBC News* (September 9, 2002), online: http://cbc.ca/cgi-bin/templates/print.cgi?2002/09/08/robinson_rights020908.

83 What counts as "reasonable limits" may (and should) change depending on the type and context of expression involved. See, for example, the treatment of expression at abortion clinic protests in B.C.: *R.* v. *Lewis*, [1997] 1 W.W.R. 496 (B.C.S.C.).

84 See *e.g.* the October 2001 anti-poverty protest organized by the Ontario Common Front, a coalition that includes the Ontario Coalition Against Poverty. For reports of the protest, see *e.g.* J. Rusk, "Activists Hope to Snarl Traffic" *The Globe and Mail* (October 16, 2001) A23, G. Smith & J. Rusk, "Protesters Snarl Downtown Traffic" *The Globe and Mail* (October 17, 2001) A18. For a discussion of the protest in the context of anti-terror legislation, see A. Dostal, "Casting the Net Too Broadly: The Definition of 'Terrorist Activity' in Bill C-36" (2002) 60 U.T. Fac. L. Rev. 69 at para. 3.

85 See *e.g. R.* v. *Lewis*, *supra* note 83. See also *R.* v. *Demers* (2003), 177 B.C.A.C. 16, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 103, online: QL (SCCA).

86 In Canada, see *e.g.* the Supreme Court's approach in *MacMillan Bloedel* v. *Simpson*, [1996] 2 S.C.R. 1048. For a comment on that case, see Amir Attaran, "Mandamus in the Environment of the Criminal Law: Ending the Anti-Protest Injunction Habit—Issues Arising from *MacMillan Bloedel* v. *Simpson*" (1999) 33 U.B.C. L. Rev. 181. More recently, see *e.g. Hamilton (City)* v. *Loucks*, [2003] O.J. No. 3669, online; QL (OJ) (Sup. Ct.) (involving the construction of an expressway through an environmentally sensitive area of Ontario). In the United States, see *e.g. Headwaters Forest Def.* v. *County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), *cert*. denied, 537 U.S. 1000 (2002) (involving the use of pepper spray against peaceful anti-logging protesters). In Europe, see *e.g. Steel and Others* v. *United Kingdom* (1998), 28 E.H.R.R. 603 (E.C.H.R.) (involving arrests of hunting protesters).

87 See *e.g. R.* v. *Behrens*, [2001] O.J. No. 245 (Prov. Off. Ct.).

88 See *e.g.* Canadian Federation of Students, "Students Declare February 6 Day of Action" *Canadian Federation of Students Newswire* (February 4, 2002), online: http://action.web.ca/home/cfso/alerts.shtml?scrl=1&scr_scr_Go=7&AA_EX_Session=1db855ffac51c07dca231c950c5ed818.

89 For example, consideration should also be given to the impact of these issues on the use of the Internet and other forms of electronic communication for the purposes of citizen participation and peaceful protest.

C. Potential Counter-Arguments

I anticipate several challenges to the underlying premises of this paper. First, what about the argument that—in light of the tragedies of September 11th—governments need wide latitude to legislate against terror and to have its law enforcement officials vigilantly protect its citizens? Certainly there is merit in this argument. And I do not, as a general matter, disagree. What I do take issue with is the underlying sensibility of fear that drives this argument. What we do by resigning ourselves uncritically to this argument is normalize the fear by which this argument is driven. I do not believe that we can, in a sophisticated modern society ruled by law, reject the notions of freedom and democracy that these governmental initiatives are themselves purportedly designed to protect. It quite frankly makes no sense. As Nordheimer J. recently stated in *France* v. *Ouzchar*:

> "While I appreciate that recent world events have brought the existence of terrorism to the forefront of most people's thoughts, I would hope that the vast majority of reasonably informed, right-thinking members of our community would agree that, notwithstanding those events, every citizen of this country is still entitled to their basic constitutional rights and freedoms…"[90]

This point was further driven home recently by Chief Justice McLachlin who stated, in an interview with *The Lawyers Weekly*, that:

> "Without wanting to trivialize in any way… September 11th—which stands in a class, obviously, of its own—what I am saying is it's the same intellectual effort [in *Charter* review] that the struggle… and the task of the law is to find ways to maintain our freedoms and our democracy and the rule of law while maintaining security… I think the court is vigilant to maintain liberties. We are very cognizant of the difficulties of police work, of course, and the difficulties that face law enforcement officers in the modern age… but we are also very conscious of the need to maintain liberty, and to ensure that Canada remains a democratic and liberal and free country where freedoms are impinged as little as possible."[91]

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[90] [2001] O.J. No. 5713 at para. 26 (Sup. Ct.).

[91] C. Schmitz, "Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals" *The Lawyers Weekly* 21:33 (January 11, 2002) 1 at 19.

Second, even if one agrees that total deference to government and law enforcement action is not warranted, surely a wide latitude in the form of time, manner and place restrictions[92] is permissible and appropriate at this time. Again, as a general matter, I do not necessarily disagree with this argument. However, what I do take issue with is the fact that these restrictions—post-September 11th—seem to have been used, in effect, to shut expression down completely. As argued above,[93] I do not see how a 100 km buffer zone between protesters and government officials at the 2002 G8 Summit in Kananaskis can be seen as a reasonable time, manner and place restriction. In my view, it was a prohibition on meaningful expression.

It is not enough to say that the protesters still were able to demonstrate in Calgary. First, there were restrictions imposed even there.[94] But in any event, there was no meaningful access to the desired target of the protests. While reasonable people could disagree on the exact distance that protesters should be kept away from political leaders, the right to free expression must include the right to expression within some kind of proximity to the target audience.

As Cronin J. indicated in the lower court judgment in *R.* v. *Lewis*, "It is not an answer to the violation of the Section 2 rights of the protesters to say that they are free to protest elsewhere".[95] Similarly, the Georgia ACLU legal director, Gerry Weber, recently indicated that the "right to free speech doesn't mean much if you can't communicate with the folks you are trying to communicate with".[96] Again, as Commissioner Hughes commented in the *APEC Interim Report*, police officials should ensure

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92 For a general review of time, manner and place restrictions in Canada, see Hogg, *supra* note 69 at 40-18–40-20.

93 Above, Part IV(ii).

94 See *e.g. supra* note 75.

95 *R.* v. *Lewis*, [1996] 4 W.W.R. 27 (B.C. Prov. Ct. (Crim. Div.)), rev'd, *R.* v. *Lewis*, *supra* note 83 (C.A.). For a useful discussion of the case, see B. Daisley, "Legislation Banning Protests Outside Abortion Clinics Constitutional: B.C.S.C." *The Lawyers Weekly* 16:24 (November 1st, 1996). The United States Supreme Court has recognized the importance of adequate alternative opportunities for expression in the context of time, place and manner restrictions. See *e.g. Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 at 94 (1977), *City of Ladue* v. *Gilleo*, 512 U.S. 43 at 54 (1994).

96 "Burk Appeals Protest Ruling" *The New York Times* (April 9, 2003), online: http://www.nytimes.com/2003/04/09/sports/golf/y09burk.html.

that a "generous opportunity will be afforded for peaceful protesters to see and be seen in their protest activities by guests to the event".[97]

Third, as a related matter, critics make the argument that the anti-globalization movement has made diligent use of the media to disseminate its messages. As such, regardless of where it is allowed to protest, the movement's message will get out. It is true that the movement has made good use of modern media. Not only has the movement itself made strong use of the Internet and other mass media vehicles, but it has also become the subject of both popularization and vilification in the press.[98]

However, in addition to the constitutional rights not only to expression but expression that is conducted within a reasonably desirable proximity to the intended target audience,[99] chosen forms of expression that are inexpensive or are otherwise accessible must be available.[100] Notwithstanding media coverage and the ability of some non-governmental organizations and other protest groups to afford and access mainstream media channels, many participants in the anti-globalization movement rely on historically protected and typically inexpensive modes of expression such as placards, leaflets, megaphones, marching, peaceful sit-ins, dancing, music, and the like. It is not an answer to these people to say that they should go and put their message on television or in newspaper advertisements. Those modes of expression, while potentially effective, may be prohibitively expensive.

Finally, critics will likely raise the argument that if we do not leave security decisions to our elected representatives, then it will be either police officers on the street or unelected judges who will be deciding what is reasonable or not in any given circumstance. As to the first concern, I agree that we need clear guidelines—for the benefit of both police officers and the public—as to what is appropriate expression or not.[101] However, there is inherently a measure of discretion in the role of policing. If police

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97 *APEC Interim Report*, *supra* note 3 at 446 [emphasis added].

98 See *supra* note 56 and surrounding text.

99 See *supra* notes 95-97 and surrounding text.

100 In Canada, see *e.g. Libman* v. *Québec (Attorney General)*, [1997] 3 S.C.R. 569 at 617; *Ramsden* v. *Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1101-1103; *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 198, 251. In the US, see *e.g. City of Ladue* v. *Gilleo*, *supra* note 95 at 57.

101 See *APEC Interim Report*, *supra* note 3 at 446-453. See also *supra* note 23 and surrounding discussion.

officers are guided by clear and appropriate guidelines, abuse of their discretion will hopefully be minimized.

Further, and in any event, to the extent that we are called on to review the actions of governments or security officials, it is ultimately the job of the courts—and not the government—to decide what is in line with our constitutional norms and traditions.[102] As the Honourable Rosalie Abella, Justice, Court of Appeal for Ontario, recently stated:

> "Judges will be required, as they inevitably are in unsettled times of crisis, to monitor and determine even more scrupulously than usual the permissibility of any limits imposed by the state when it purports in good faith to calibrate the tension between the public's insecurities and its need for security. What, for example, will constitute reasonable limits in a free and democratic society confronting terrorism? What evidentiary basis will assist us in deciding whether, how high, and for how long to raise the justificatory threshold for government intrusion?
>
> President Bush changed the name of the campaign against terrorism from Operation Infinite Justice to Operation Enduring Freedom. Either way, the adjective connotes a long-term undertaking for his allies. That means that the public is likely to be apprehensive and raw for a long time. And that, in turn, means that as judges we will have to be vigilant for a long time: vigilant that we are neither over nor underreacting; vigilant that we are paying closer attention to the law and evidence before us than to our own fears or misconceptions; vigilant in remembering that compliance

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[102] For a useful discussion of the court's judicial review function in the context of post-September 11th Canada, see L.E. Weinrib, "Terrorism's Challenge to the Constitutional Order" in *Security of Freedom*, *supra* note 39 at 93; L.E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6 Rev. of Const. Stud. 119. See further the recent remarks of the Honourable Mr. Justice A.H.J. Wachowich, Chief Justice of the Alberta Court of Queen's Bench, indicating that:

> "In a democracy, one of the roles of the Court is to ensure that neither the legislative nor the executive level of government oversteps their respective boundaries. That is a mandate conferred on the courts by the Constitution and the Rule of Law. It is important [to]…understand that this is a mandate specifically conferred by Parliament through the Canadian Charter of Rights and Freedoms—it is not a mandate that the courts took on themselves, as some seem to think."

A.H.J. Wachowich, "Opening of the Court of Queen's Bench of Alberta, 2002-2003 Session" (Edmonton, September 3, 2002), online: Alberta Courts homepage http://www.albertacourts.ab.ca/qb/notices/opening02-03speech.pdf.

> with public opinion may jeopardize compliance with the public interest; and vigilant that our independence and impartiality are not cauterized by controversy. Vigilant, in short, that we do our best to keep doing our jobs properly."[103]

There are, I am sure, other potential challenges to this discussion.[104] However, in my view—at least in the context of those set out above—none of them challenge the more fundamental principle that free expression, in the context of citizen participation and peaceful protest,

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[103] R.S. Abella, "Judging in the 21st Century" (2002) 25 Advocates' Q. 131, 138-139. Madame Justice Abella has further argued that:

> "democracy is enhanced, not cauterized, by a judiciary effectively fulfilling its Charter mandate, and… democratic values are strengthened not only by a strong legislature, but also by a strong judiciary… democracy is not—and never was—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, notwithstanding the wishes of the majority. It is this second, crucial aspect of democratic values which has been submerged by the swirling discourse… When legislatures elected by majorities enact laws like the Charter, the majority is presumed to agree with that legislature's decision to entrench rights and extend a constitutionally guaranteed invitation to the courts to intervene when legislative conduct is not demonstrably justified in a democratic society. In enforcing the Charter, therefore, the courts are not trespassing on legislative authority, they are fulfilling their assigned democratic duty to prevent legislative trespass on constitutional rights."

R.S. Abella, "The Judicial Role in a Democratic State" (Keynote Address, 1999 Constitutional Cases Conference, Osgoode Hall Law School, York University, April 7, 2000), online: http://www.ontariocourts.on.ca/court_of_appeal/speeches/judicialrole.htm. See also R.S. Abella, "The Future After Twenty Years Under the Charter" (Closing Session, Canadian Rights and Freedoms, 20 Years Under the Charter, The Association for Canadian Studies, Ottawa, April 20, 2002), online: http://www.ontariocourts.on.ca/court_of_appeal/speeches/future.htm.

Further, and in any event, even if a court charged with the duty of reviewing government action gets the balance wrong, s. 33 of the *Charter*—the "notwithstanding clause"—provides some comfort to those who are skeptical of an all-powerful judiciary. While a comprehensive discussion of s. 33 of the *Charter* is beyond the scope of this paper, for a general discussion, see Hogg, *supra* note 69 at 36-1–36-11. I am grateful to Barbara Billingsley for raising this issue.

[104] For example, others might argue that the amount of damage that has been caused, and that is potentially caused, by anti-globalization protesters warrants significant security restrictions. The result of this approach, however, is that the vast majority of protesters—participating in a peaceful manner—are treated in a similar fashion as a totally different group—a minority—of violent protesters. Again, while I acknowledge that police may put into place appropriate time, manner and place measures that help to curb violence, property damage and injury, labeling all protesters as violent—or worse still, as terrorists—fails to tailor narrowly restrictions on *Charter* freedoms.

must be jealously guarded by a society characterized by freedom and democracy, not by fear and authority.

CONCLUSION

At the outset of this paper, I queried whether our post-September 11th legislative initiatives and law enforcement responses—for example, as discussed in this paper, the police responses around the 2002 G8 Summit in Alberta—can be justified as "reasonable limits" on citizens' rights to protest actively; or whether they instead can only be justified as reasonable limits in a society characterized by fear, insecurity and government control?

If we accept as "reasonable" those limits on expression that we saw in Kananaskis, then what we have done, in my view, is to normalize a sensibility of fear by which to judge those limits. As with the discussion between Cassius and Brutus in Shakespeare's Julius Caesar set out at the beginning of this paper,[105] whether we follow this trajectory of fear is, in the end, up to us. This paper urges a step away from our current path. Rather, I argue for a path that puts the "reasonable" back into "reasonable limits" of section 1 of the *Charter*. If we do not take this step, then through our far-reaching anti-terrorism initiatives we will have started to silence not only those who want to tear down buildings, but also those who peacefully want to question what those buildings stood for, not in the name of terror, but rather in the name of institutional tinkering and future reform. By giving our police and governments unbridled power, we will be ignoring the very democratic principles for which our governments are currently fighting.

This point was made recently (and more artfully) by Margaret Atwood who, again when commenting on the state of post-September 11th America, cautioned that:

> "If you proceed much further down the slippery slope, people around the world will stop admiring the good things about you. They'll decide that your city upon the hill is a slum and your democracy is a sham, and therefore you have no business trying to impose your sullied vision on them. They'll think you've

[105] *Supra* note 1.

> abandoned the rule of law. They'll think you've fouled your own nest.
>
> The British used to have a myth about King Arthur. He wasn't dead, but sleeping in a cave, it was said; in the country's hour of greatest peril, he would return. You, too, have great spirits of the past you may call upon: men and women of courage, of conscience, of prescience. Summon them now, to stand with you, to inspire you, to defend the best in you. You need them. "[106]

Similarly, we as Canadians need to be strong and resist the fear that embraces us. This is what a commitment to free expression demands. The analysis provided by Commissioner Hughes through the APEC Inquiry provides us with a good starting point.

Shirley Tilghman, President of Princeton University, commented shortly after the events of September 11th that: "Defending… freedom of speech is not particularly difficult in times of peace and prosperity. It is in times of national crisis that our true commitment to freedom of speech and thought is tested."[107] It is time for us to demonstrate that "true commitment".

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[106] "A Letter to America", *supra* note 51.

[107] S.M. Tilghman, "Discovery and Discourse, Leadership and Service: The Role of the Academy in Times of Crisis" (Presidential Installation Address, Princeton University, September 28, 2001), online: http://www.princeton.edu/pr/news/01/q3/0928-SMT.htm.

Dialogue or Conversation? The Impact of Public Interest Interveners on Judicial Decision Making

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This paper will explore the role of public interest advocacy organizations in Supreme Court of Canada cases from 1982 to 2002. More specifically, I will outline the extent and character of public interest interventions in Supreme Court cases in the last twenty years in the areas of labour law, family law, and equality rights law. Litigation strategies employed by interveners will be discussed, particularly the use of international law to influence the judicial interpretation of these areas of law.

I will elaborate my reasons for choosing these three areas, and my methodology below. To begin, I will discuss why I believe it is important to devote attention to these issues. First, I am interested in exploring the construction of constitutional litigation by the Supreme Court, which has used a "dialogue" metaphor in a number of cases to explain the development of the law, and the role of and discussion between the courts and the legislatures in this process.[1] I will discuss whether "conversation" is a more apt metaphor, and the breadth of this conversation, taking into account the role of public interest interveners in constitutional cases and in other areas of law.

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[1] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at paras. 137-139; *M.* v. *H.,* [1999] 2 S.C.R. 3 at paras. 78, 286, 328; *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 116; *R.* v. *Mills*, [1999] 3 S.C.R. 668 at para. 57; *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 268 [hereinafter *Little Sisters*]; *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at paras. 65-66; *Sauvé* v. *Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras. 17, 104-108; *R.* v. *Hall*, 2002 SCC 64 at para. 43; *Figueroa* v. *Canada (Attorney General)***,** 2003 SCC 37 at para. 183. The dialogue metaphor has its genesis in P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75. Hogg also uses the notion of "dialogue" in describing the role of interveners. See P.W. Hogg, "The Charter Revolution: Is It Undemocratic?" (2001/2002) 12:1 Constitutional Forum 1 at 4.

An analysis of this aspect of the role of interveners is timely, given the critique, from a range of perspectives, of the courts as "judicial activists".[2] It is trite to acknowledge the expanded role of the judiciary since the *Canadian Charter of Rights and Freedoms* came into effect in 1982, and to note that courts are not democratically elected nor accountable to the public. A broad approach to allowing interveners to appear before the courts may offset this critique to a degree, and ensure that judges hear from as wide a range of voices as their counterparts in the legislature.

A second reason for studying public interest advocacy flows out of self interest. I have been involved in the Women's Legal Education and Action Fund (LEAF) as a staff lawyer and volunteer since 1995. My own experience, and my assumption in undertaking this research is that the work of interveners matters in allowing the courts to consider a range of perspectives on the issues before them.[3] I am interested in exploring the different approaches taken by interveners, and the influence of these approaches, with a view to enhancing the conversation amongst intervener groups so that they can continue and strengthen their ability to be of assistance to the courts.

A third reason for studying public interest interventions relates to recent comments by members of the Supreme Court that public interest groups have had their day in court, and it is perhaps time to be more restrictive about allowing intervener status. Justice Iacobucci, in a 2000 interview with *The Globe and Mail*, said of interveners: "Should there be

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[2] See for example F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party*, (Peterborough: Broadview Press, 2000); C. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001); F.C. DeCoste, "The Separation of State Powers in Liberal Policy: *Vriend* v. *Alberta*" (1999) 44 McGill L.J. 231; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994). For responses to Morton & Knopff, see P.W. Hogg, *ibid.*; M. Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" (2002) 35 Canadian Journal of Political Science 3. Smith also discusses the role of the media in the critique of judicial activism (at 4).

[3] In this sense, I am what Gregory Hein calls a "judicial democrat", as it is my view that the litigation process can "enhance democracy" rather than curtail it, particularly as regards the interests of the disadvantaged. See G. Hein, "Interest Group Litigation and Canadian Democracy", in P. Howe & P. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 214 at 217, 237. For an earlier proponent of this view, see P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490.

as many? ... Looking back, those intervenors played a highly significant role. But it's now getting on to be 18 years or so later. Should we be looking at the question in different ways?"[4] In 1999, Justice Major commented on interveners as follows:

> "Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are ... of no value. That approach is simply piling on, and incompatible with a proper intervention. ...
>
> [I]f interveners fail to demonstrate the value of their role, the present liberal granting of that status may grow more restrictive."[5]

Other commentators have been critical of the frequency and tenor of interventions as well.[6] Most notably, Morton and Knopff have critiqued "the court party" on the basis that interveners wield unprecedented powers, at state expense, to put forward and realize their policy objectives.[7]

Another significant development is that in 1999, the Supreme Court announced that it would "strictly enforce" the rules for applications for leave to intervene.[8] A study by Patrick Monahan shows that the Court continued to grant intervener status generously in the year immediately following these remarks,[9] but more recent cases indicate that the Court has

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4 K. Makin, "Intervenors: how many are too many?" *The Globe and Mail* (March 10, 2000) A2.

5 Mr. Justice J.C. Major, "Interveners and the Supreme Court of Canada" (1999) 8:3 *National* 27 at 27, 28.

6 DeLloyd Guth, professor of law at the University of Manitoba, was also cited in the Makin article as somewhat skeptical of interveners: "Let's face it. Some intervenors are there in the hope of a headline or a byline. They want to be able to go back and justify themselves at the group's annual meeting. The court doesn't need that." *Supra* note 4.

7 F.L. Morton & R. Knopff, *supra* note 2 at 26.

8 Supreme Court of Canada, *Notice to the Profession* (September 1999).

9 P. Monahan, "Intervention in Constitutional Cases At Supreme Court Increase Despite Stricter Enforcement of Rules" (Osgoode Hall Professional Development Program, 2000 Constitutional Cases, April 2001) [unpublished]. Monahan found that "the frequency and number of interventions in constitutional cases at the Supreme Court of Canada increased in 2000" (at 1). See also B.A. Crane & H.S. Brown, *Supreme Court of Canada Practice 2002*, (Scarborough: Carswell, 2002) at 300, who note that the Court rarely denies applications for leave to intervene. The authors do

been more restrictive in allowing applications for interventions, and even where it does so, in allowing oral submissions to be made. If it is the case that interventions are being limited, what impact will this have on the development of the law, and on principles of democracy and participation?

In terms of methodology, I reviewed all Supreme Court of Canada decisions in labour,[10] family[11] and equality rights[12] law from 1982 to 2002 to assess a number of trends: numbers of interventions, frequency of interventions of particular public interest groups, the number of interventions where coalitions or groups were at play, and the use of international law by interveners, parties and the Court. I selected these three subject areas because they cover the spectrum in terms of areas of law traditionally considered to be private and public, and I am interested in exploring different levels of interventions along this spectrum.[13] I also reviewed recent cases where intervener applications were denied or restricted, to determine the trends in this area.

Second, I conducted interviews with representatives of four of the five public interest groups that intervened most often in family, labour and equality rights cases from 1982 to 2002.[14] Interveners were asked a series

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cite a number of cases in which leave was recently denied, or interveners were limited to written submissions. These cases will be discussed below at 14-15, below.

[10] This category includes both labour and employment law cases, and cases involving the statutory regulation of the workplace.

[11] This category includes matrimonial property, divorce, custody and access, spousal and child support, child welfare, parental benefits, and immigration cases.

[12] The equality rights cases in the sample exclude criminal cases, as most such cases involve multiple sections of the *Charter*. I chose to focus on "pure" equality cases where a law or state action was being challenged as violating s. 15 of the *Charter* as opposed to cases where s. 15 was cited to support a law, or as an interpretive principle.

[13] Future research will explore the impact of rights discourse in challenging the public/private divide, and the role of interveners in this respect. There is a vast literature critiquing the categorization of laws as private and public. See for example S.B. Boyd, ed., *Challenging the public/private divide: feminism, law, and public policy* (Toronto: University of Toronto Press, 1997); Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide* (Vancouver : UBC Press, 2003).

[14] Interview with Diana Majury, Chair, National Legal Committee, LEAF (August 18, 2003) [hereinafter LEAF interview]; Interview with Bruce Porter, Coordinator, Charter Committee on Poverty Issues (August 18, 2003) [hereinafter CCPI interview]; Interview with Laurie Beachell, National Coordinator, Council of Canadians with Disabilities (August 20, 2003) [hereinafter CCD interview]; Interview with Alan Borovoy, General Counsel, Canadian Civil Liberties Association (August

of questions about their legal strategies, their processes and criteria for selecting and developing arguments in cases, and their measurements of success.

In section II of this paper, I will review the extent of public interest interventions in the selected areas from 1982 to 2002, and the strategies of the public interest groups involved in these interventions. In section III, I will address the influence of the interveners' use of international law, and the Court's treatment of these submissions. My research supports the conclusion that public interest interveners should be seen as an integral part of a conversation amongst the courts, legislatures and the broader public.

I. PUBLIC INTEREST INTERVENTIONS BEFORE THE SUPREME COURT OF CANADA, 1982-2002

Table 1 – Number of Interventions at Supreme Court, 1982-2002[15]

Interveners	Family	Labour	Equality	Total Interventions	Coalitions
Any public interest interveners	**18**	**25**	**27**	**55**	**21**
Women's Legal Education and Action Fund (LEAF)	9	5	9	**17**	4
Canadian Labour Congress	0	11	5	**12**	2
Canadian Civil Liberties Association	2	5	2	**9**	0
Council of Canadians with Disabilities	0	4	6	**8**	3
Charter Committee on Poverty Issues	4	0	6	**7**	1

22, 2003) [hereinafter CCLA interview]. An interview could not be arranged with a representative of the Canadian Labour Congress.

[15] As my interest is in the influence of public interest groups, I have not included interventions by attorneys general, or by tribunals and other government bodies.

As shown in Table 1, the total number of cases with public interest interveners in the areas of family, labour and equality rights law from 1982 to 2002 is 55.[16] Of these cases, 18 are decisions in family law, 25 are decisions in labour law, and 27 are decisions in equality rights law.[17] Of particular interest is the number of equality rights cases, which can be compared to the number of Supreme Court cases in this area from 1982 to 2002 where there were no interveners: ten cases.[18] Interveners were thus present nearly three times more often than not in equality rights cases. Given that the mandates of several intervener groups relate to the promotion and protection of equality rights, or the restriction of such rights, as will be discussed below, this is not a surprising result. Another matter of note is that there were significant numbers of public interest interventions in family and labour law cases, even though these areas of law have traditionally been viewed as "private".

Table 1 also sets out the five public interest groups that intervened most frequently in the 55 cases, and in which areas.[19] According to Table 1, LEAF was the most frequent intervener in the three subject areas, with a total of 17 interventions. These interventions occurred in all three subject areas, although equality rights and family cases were the most frequent sites of involvement for LEAF. The Canadian Labour Congress had 12 interventions, predominantly in labour and employment law cases, but

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16 A list of these cases is set out in Appendix 1.

17 Some cases are classified as falling into more than one of these subject areas. For example, *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [hereinafter *Dunmore*], see Appendix 1 at ix, below, is a labour and equality case; *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*] (see Appendix 1 at iii, below) is a family and equality case. It must also be remembered that s. 15 of the *Charter* did not come into effect until 1985, so there is a 3 year shorter time period for these cases.

18 *Rudolph Wolff & Co.* v. *Canada*, [1990] 1 S.C.R. 695; *Dywidag Systems International, Canada Ltd.* v. *Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705; *Harrison* v. *University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn.* v. *Douglas College,* [1990] 3 S.C.R. 570; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Haig* v. *Canada*, [1993] 2 S.C.R. 995; *Miron* v. *Trudel*, [1995] 2 S.C.R. 418; *Law* v. *Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497; *Nova Scotia (Attorney General)* v. *Walsh*, 2002 SCC 83.

19 Again, there is overlap in the categories of cases, so the numbers in the different subject areas may be more than the total number of interventions. There are a number of other interveners that are close behind the top five in these subject areas: Equality for Gays and Lesbians Everywhere (5 interventions), the Evangelical Fellowship of Canada (4 interventions), and the Canadian Bar Association (4 interventions).

also in an equality case outside the labour context.[20] The Canadian Civil Liberties Association intervened in 9 of the 55 cases, most often in the labour area.[21] The Council of Canadians with Disabilities[22] had 8 interventions, mostly in the area of equality rights. Lastly, the Charter Committee on Poverty Issues intervened in 7 cases, also predominantly in the area of equality rights. The total number of cases where one or more of these five groups was present is 37, or two thirds of the total number of cases with interveners in the selected areas.

One observation from this data is that all of the groups intervening most often in the three subject areas examined could be classified as rights seeking groups. For the most part, the interventions of these groups are based on ideologies which seek to promote individual or group rights and freedoms, as opposed to restricting them. This result is obviously affected by my choice of subject areas, as research looking at interventions more broadly indicates that other interest groups are frequently present before the courts, including corporate interests, professionals, and social conservatives.[23] This is apparent in my sample of 55 cases, where several of the interveners appearing multiple times were social conservatives seeking to restrict the rights of the disadvantaged, and to protect the "traditional family".[24]

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[20] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*], see Appendix 1 at iii, below.

[21] The CCLA only made s. 15 arguments in one of the equality cases, *Adler* v. *Ontario*, [1996] 3 S.C.R. 609 (see Appendix 1 at iv, below).

[22] This group was formerly called the Coalition of Provincial Organizations of the Handicapped (COPOH), and I have included cases involving both organizations in the sample.

[23] These are the terms used by Gregory Hein, *supra* note 3 at 218-219. See also Mandel, *supra* note 2, who argues that business interests have played a powerful role as interveners.

[24] For example, REAL Women intervened in a number of cases: *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530 [hereinafter *Tremblay*], see Appendix 1 at ii, below; *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*], see Appendix 1 at iii, below; *M.* v. *H.*, [1999] 2 S.C.R. 3, see Appendix 1 at vi, below. Focus on the Family intervened in *Mossop*, *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*], see Appendix 1 at vi, below, and *M.* v. *H.* The Evangelical Fellowship of Canada intervened in *Mossop, Winnipeg Child and Family Services* v. *G. (D.F.)*, [1997] 3 S.C.R. 927, see Appendix 1 at v, below, *Vriend*, and *M. v. H.*

A related trend is that in cases where more than one of the top five interveners was present, the groups would typically appear on the same side of the issue.[25] This observation is not to detract from the nuances or different perspectives of the arguments made by the interveners, however.[26] Moreover, if criminal cases had been included in the sample, this trend would likely have been different, particularly comparing the positions of the Canadian Civil Liberties Association and the other groups.[27]

Interviews with representatives of the most frequent intervener groups in the selected areas suggest that most have a sophisticated process for case selection. The groups begin with their mandates, and choose cases which will further this agenda.[28] This may involve taking on cases outside of their specific areas of interest to focus on the development of theory.[29] Even within their mandates, groups are selective about which cases they seek to intervene in, looking at a range of factors: whether the case will further the interests of their constituency, particularly the most vulnerable members,[30] the impact they might make in the case, including a

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[25] For example, in *Tremblay*, *ibid*., LEAF and the Canadian Civil Liberties Association both supported the abortion rights of the respondent Chantal Daigle; in *U.F.C.W., Local 1518* v. *KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 [hereinafter *Kmart Canada Ltd.*], see Appendix 1 at vii, below, the Canadian Labour Congress and the Canadian Civil Liberties Association both supported a broad right of secondary picketing.

[26] For example, in the *Little Sisters* case, *supra* note 1, Appendix 1 at viii, below, the Canadian Civil Liberties Association focused its submissions on freedom of expression under s. 2(b) of the *Charter*, while LEAF was concerned with equality rights under s. 15.

[27] For example, LEAF and the Canadian Civil Liberties Association took opposing positions on the constitutionality of the rape shield provisions in *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577; *R.* v. *Gayme*, [1991] 2 S.C.R. 577.

[28] The mandates of the groups are: LEAF: the advancement of the equality rights of all women and girls in Canada; CCD: promotion of the equality rights of persons with disabilities; CCLA: protection and promotion of fundamental civil liberties and human rights; CCPI: promotion of the rights of the poor under international human rights law, the *Charter*, human rights law, and other laws in Canada; CLC: promotion of fair wages and working conditions, improved health and safety laws, fair taxes and strong social programs, and social equality.

[29] For example, LEAF intervened in *Law Society British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*] (see Appendix 1 at i, below), although this was not a case involving women's equality, in order to shape the Court's approach to s. 15 of the *Charter*; the Canadian Labour Congress intervened in *Egan*, *supra* note 20 (see Appendix 1 at iii, below), although this was not a labour or employment case.

[30] Interviews with CCD, CCLA, LEAF, *supra* note 14.

consideration of whether other interveners will make similar arguments,[31] overall case load, in terms of both human resources and the range of issues involved,[32] remedial issues,[33] follow up potential for the group's law reform and education activities,[34] and cost.[35] Many of the groups noted the difficulty in mounting interventions involving provincial legislation, given that the Court Challenges Program (CCP) funds only challenges to federal law.[36] This often effectively excludes interventions in cases within the areas of interest of many of the groups in question. For example, laws relating to social assistance, health, and the family are often within provincial legislative competence, and beyond CCP's mandate.

Processes for case selection vary, but all of the groups interviewed employ extensive discussions within the organization before deciding whether to seek intervener status in a case. A majority of the groups also undertake consultations with legal experts, members of their constituencies and other public interest groups in making this decision.[37] The process for developing arguments in an intervention is similarly complex for all of the groups interviewed, including discussions amongst counsel, committees of experts, and members of the affected communities. Some groups spoke of the time and expense involved in this process, and reiterated the importance of funding for interventions.[38]

It is important to note that public interest litigation is not the only legal strategy utilized by these groups. All groups were involved, to a greater or lesser extent, in law reform activities—submitting briefs to government, testifying before legislative committees, and consulting with government

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31 Interviews with CCLA, CCPI, LEAF, *ibid.*

32 Interviews with LEAF, CCPI, *ibid*.

33 Interviews with LEAF, CCD, *ibid*.

34 Interview with LEAF, *ibid*.

35 Interviews with LEAF, CCPI, CCD, *ibid*. (although CCD noted that it is one of the few organizations with core funding). Cost was said not to be such a significant issue for the CCLA, even though it accepts no government or Court Challenges Program funding. Of course, the participation of interveners may also increase the costs of the parties. For a discussion of this issue, see Bryden, *supra* note 3 at 516.

36 Interviews with LEAF, CCPI, CCD, *ibid*.

37 Interviews with LEAF, CCPI, CCLA, *ibid*.

38 Interviews with LEAF, CCD, and CCPI, *ibid*.

officials—as well as international human rights work,[39] public, legal and judicial education,[40] media work,[41] and other research and writing activities.[42] The groups may undertake more than one legal strategy in relation to a particular issue, and for most, the relative level of public interest litigation changes over time.[43] This supports the contention that the groups are involved in a conversation with both the courts and legislatures.

Interveners often work together in coalition or alliance—in other words, they work with one another to file a joint factum and deliver one set of oral submissions in a given case. In the sample of all cases with interveners, the total number of cases where coalitions were at work is 21/55; and in the smaller sample involving the top five interveners, it was 14/37—over 35%—of the cases in both samples.[44] Interviews with the most frequent interveners elaborated on why the groups work in coalition: to share costs,[45] to trade ideas and expertise,[46] and to deal with intersecting issues.[47] Coalitions may be centred around a particular constituency,[48] or around a particular issue, including the development of theory.[49] All of the

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[39] Interview with CCPI, *ibid*. This work includes submissions to the Committee on Economic, Social and Cultural Rights and the UN Human Rights Committee, the preparation of shadow reports, and education at the international level.

[40] Interviews with LEAF, CCPI, CCLA, and CCD, *ibid*.

[41] Interviews with CCLA, LEAF, *ibid*.

[42] Interviews with LEAF, CCLA, CCPI, *ibid*. All the groups interviewed provide copies of their intervener facta and government submissions on request, and sometimes on their websites.

[43] LEAF estimates that it does 75% litigation and 25% law reform and legal education; CCD noted that in its early days, it did mostly law reform, but its litigation activities increased in the 1990s due to government cutbacks and deficit reduction, making law reform and lobbying less viable options; for CCLA, litigation is a more recent strategy as compared to law reform; and CCPI engages in approximately 65-70% litigation and 30% law reform and international human rights work.

[44] See Appendix 1, below.

[45] Interview with CCPI, *supra* note 14.

[46] Interviews with CCPI, CCLA, and LEAF, *ibid*.

[47] Interviews with CCPI, LEAF, *ibid*.

[48] For example, CCD often intervenes in coalition with other disability rights groups, and LEAF often intervenes with other groups focusing on women's equality.

[49] Interviews with CCD, CCPI and LEAF indicate that these three groups often intervene in coalition with other equality seeking groups, even if the groups have a

groups interviewed were adamant that coalition work is undertaken not just for the sake of it, or to "pile on" interveners, but to make the intervention more meaningful. Coalition work renders the intervention process more time consuming, expensive, and complicated; it is not done lightly.[50] The groups viewed coalition work as positive for the courts, as it reduces the number of written and oral arguments overall, and allows the courts to explore the intersections of different perspectives and contexts.[51] At the same time, groups should not be forced to work together in an intervention, as has happened in at least two Supreme Court cases, given the process and resource issues raised above.[52]

In addition to working in formal associations, public interest groups may share ideas, arguments, and strategies even if only one of the groups applies for intervener status in a case.[53] Moreover, interveners often meet before a case is heard, or even before their motions for leave to intervene are filed, in order to work out their respective areas of interest and to ensure no duplication occurs.[54]

Thus, it is fair to say that there is significant dialogue amongst interveners, and a well developed process for determining which groups will file motions for leave to intervene, in which cases, with whom, and with what submissions. Limits on resources, both financial and human, indicate that these interveners are very selective about where they believe they can offer the most insight.

Despite this selectivity, there are a number of recent cases where the Supreme Court has denied or restricted interventions. In *Dunmore* v. *Ontario*, the Charter Committee on Poverty Issues was denied leave to

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different constituency. The CCLA typically restricts its alliances to other civil liberties groups, although it may work more broadly in its law reform work.

50 Interviews with CCD, CCPI, LEAF, *ibid*.

51 Interviews with LEAF, CCPI, *ibid*.

52 See J. Sopinka & M.A. Gelowitz, *The Conduct of an Appeal*, 2nd ed. (Toronto: Butterworths Canada Ltd., 2000) at 272, citing *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 [hereinafter *Renaud*] (Appendix 1 at ii, below) and *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

53 Interviews with CCPI, LEAF, *supra* note 14.

54 Interviews with CCPI, CCD, LEAF, *ibid*. (although CCD noted that this has become more difficult now that many organizations are strapped for resources).

intervene.[55] In *Lovelace* v. *Ontario*, several groups were either denied leave to intervene,[56] or restricted to written submissions.[57] The second trend is notable in other cases as well.[58] Unfortunately, reasons are often not provided for these decisions, or they are generic, noting that the applicants did not satisfy the Court that they would provide fresh information or a fresh perspective on the issues in the case.[59] Reasons would certainly be helpful to interveners so that they could respond to the concerns of the Court in future applications. The Court is also becoming stricter with late applications, as it noted it would in its 1999 *Notice to the Legal Profession*.[60]

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[55] *Dunmore*, *supra* note 17, see Appendix 1 at ix, below. See Supreme Court of Canada, *Bulletin of Proceedings* (August 25, 2000), Major J. CCPI's application for reconsideration was denied on January 8, 2001. See Supreme Court of Canada, *Bulletin of Proceedings*, (January 19, 2001), Major J. Reasons were not given for either decision.

[56] Groups denied leave to intervene in *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950 [hereinafter *Lovelace*] (see Appendix 1 at viii, below) include the B.C. Native Women's Society, Antoine Algonquin First Nation and Aboriginal Legal Services of Toronto Inc. See Supreme Court of Canada, *Bulletin of Proceedings* (July 9, 1999), Bastarache J.

[57] Groups denied leave to present oral arguments in *Lovelace*, *ibid.* include CCPI and the Metis National Council of Women.

[58] For example, in *Boston* v. *Boston*, [2001] 2 S.C.R. 413 [hereinafter *Boston*], see Appendix 1 at viii, below, LEAF was granted leave to intervene, but was not permitted to make oral arguments. See Supreme Court of Canada, *Bulletin of Proceedings* (January 12, 2001), Binnie J.: "LEAF's written argument fully sets out the general principles that in LEAF's submission ought to govern the disposition of cases such as the present; and ... it would be inappropriate to permit LEAF to appear at the hearing of the appeal to make detailed submissions supporting the respondent's position on the merits any more than is already done in the written argument". See also *Dunmore*, supra note 17, Appendix 1 at ix, where the Labour Issues Coordinating Committee's request to present oral argument was dismissed (Supreme Court of Canada, *Bulletin of Proceedings* (February 23, 2001)).

[59] For example, see *Lovelace*, *supra* note 56 (Appendix 1 at viii, below), Supreme Court of Canada, *Bulletin of Proceedings* (July 9, 1999), Bastarache J.; *Boston*, *ibid*. (Appendix 1 at viii, below).

[60] See *Lovelace*, *ibid*. For a case to the contrary, see *Berry* v. *Pulley*, [2002] 2 S.C.R. 493, Appendix 1 at ix, where the Canadian Labour Congress was allowed an extension of time to file its motion (Supreme Court of Canada, *Bulletin of Proceedings* (June 8, 2001), L'Heureux Dubé J.).

Many of the groups interviewed find the inability to make oral arguments frustrating.[61] This is particularly so given that interveners' facta are typically limited to 20 pages, and oral argument is seen as an opportunity to emphasize critical points and develop the nuances of the arguments beyond what is possible in a document of this length. Moreover, the interveners believe that oral argument provides a chance to engage the Court and respond to its questions, thereby having a true dialogue.[62]

Interestingly, there are a number of leading Supreme Court cases where public interest groups did not seek intervener status. For example, in *Law* v. *Canada*, the Court developed new guidelines for claims under section 15 of the *Charter*, but there were no interveners involved in the case.[63] Many observers were surprised that the Court took this opportunity to consolidate its approach to section 15 without the assistance of interveners who had been present in so many other equality rights cases. This new test for section 15 has been extensively critiqued, and it must be asked whether having interveners there would have made a difference.[64] One possible solution is that courts could post a call for interveners if they intend to use a case as one where new tests or guidelines will be developed. While this does not appear to have been done at the Supreme Court, it has happened at the lower court level.[65]

Overall, then, interveners have been present in a large number of cases in all three areas canvassed in this study. Interviews with the four most frequent interveners reveal that this involvement is well thought out and coordinated, and that the groups attempt to make their voices heard on the most critical issues, and in the most significant fora. This gives rise to the next question—are the voices of interveners being heard?

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61 Interviews with LEAF, CCPI, *supra* note 14.

62 Interviews with LEAF, CCLA, *ibid*. CCLA did note that perhaps oral argument was not always required, but said that if it was granted, 10 minutes was not sufficient.

63 *Law* v. *Canada*, *supra* note 18.

64 See B. Baines, "*Law* v. *Canada*: Formatting Equality" (2000) 11:3 Constitutional Forum 65 at 67. For other critiques of the case, see D. Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences", (2001) 13 C.J.W.L 37; J. Ross, "A Flawed Synthesis of the Law", (2000) 11:3 Constitutional Forum 74.

65 See *Kane* v. *Alberta Report*, 2001 ABQB 570, where the Alberta Court of Queen's Bench called for interveners in a special case to assist it in rendering an opinion on the interpretation of a new section of the *Human Rights, Citizenship and Multiculturalism Act*.

II. THE IMPACT OF PUBLIC INTEREST INTERVENTIONS: THE EXAMPLE OF INTERNATIONAL LAW

A more difficult issue is how to assess the impact of public interest interveners on the development of the law in the selected areas. While this may seem to be a simple matter of methodology, it also raises the question of whether this is a challenge to which interveners should have to respond.[66] By definition, interveners are playing a valuable role when they make submissions to the courts, as they are only granted leave where they will present arguments "which will be useful and different from those of the other parties."[67] Still, given the recent tendency of the Supreme Court to fail to recognize the benefit of interveners in some cases, it is pertinent to review this issue.

In terms of methodology, one could try to determine the win/loss records of interveners, and draw inferences about their influence in this way.[68] A problem with this approach, however, is how to decide whether a case is a win or loss. This may do an injustice to the nuances in the interveners' arguments, and may ignore the long term, incremental impact of their submissions.[69] Another approach would be to look at explicit references to interveners by the courts, whether positive or negative. The difficulty of this method is that courts often adopt or reject interveners' positions without attributing them to the groups in question.[70] A third approach is to review interveners' arguments and the court's decisions, to try to assess the court's receptivity to the submissions in substance if not by explicit reference. I decided to test the latter method by looking at a discreet issue—the use of international law by interveners and the courts.[71]

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66 I thank Philip Bryden for engaging me on this point.

67 *Reference re: Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 at 339.

68 See, for example, Morton & Knopff, *supra* note 2 at 26 (referring to LEAF).

69 M. Smith is also critical of an approach that focuses on win/loss records, *supra* note 2 at 26-27.

70 This was a complaint for at least one intervener, who noted that courts should acknowledge interveners explicitly as a sign of respect. It was noted that this is done more often in the United States. Interview with CCLA, *supra* note 14.

71 I used a broad definition of international law, including not only treaties to which Canada is a party, but other treaties, declarations and resolutions, and reports and decisions of international bodies. This is in keeping with *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [hereinafter *Baker*], see

For this part of the study, I restricted the sample to the same areas of law, and reviewed those cases where one or more of the five most frequent intervener groups was present. This was done in order to have a smaller, more manageable sample size, and based on my assumption that there is a greater likelihood of a group making arguments based on international law if it has some sophistication and expertise as an intervener. I reviewed the facta of all parties and interveners, and the decisions in these cases to determine the extent to which interveners are using international law in their submissions, the extent to which this is the only or primary way these arguments are being placed before the Court, and the extent to which the Court has adopted these arguments in its judgments.

Table 2

Use of International Law by parties, interveners and the Supreme Court

Case	Court cited International Law	Interveners Cited International Law	Parties Cited International Law
Andrews (1989)	Yes	Yes (LEAF)	Yes
Lavigne (1991)	Yes	Yes (CLC)	Yes
Egan (1995)	Yes	Yes (EGALE, Interfaith coalition)	No
Gordon v. *Goertz* (1997)	Yes	No	No
Winnipeg Child and Family Services v. *G.* (1997)	Yes	Yes (Women's Health Clinic coalition, Centres jeunesse du Quebec, Catholic Group for Life)	No
Granovsky (2000)	Yes	No	No
Dunmore (2001)	Yes	Yes (CLC)	Yes
Gosselin (2002)	Yes	Yes (CCPI, others)	Yes

Table 2 sets out eight family, labour and equality rights cases from 1982 to 2002 where the Court cited international law, and where one or more of the five interveners was present.[72] In six of the eight cases, or

Appendix 1 at vi, below, where a majority of the Court took a broad approach to the use of international law. See also *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [hereinafter *Suresh*], where the Court unanimously endorsed this approach.

[72] There were 11 cases out of the sample of 37 where the Court cited international law. Only 8 of these cases could be reviewed in full, as three were in the process of being

75%, interveners cited international law in their submissions, in four of the eight cases, or 50%, the parties cited international law, and in two of the eight cases, or 25%, the Court referred to international law without the benefit of legal argument in this respect. While this is a small sample, it suggests that interveners are more likely than the parties in a case to place arguments concerning international law before the Court. This is consistent with Justice Major's 1999 comments about where interveners can be most useful to the Court—in presenting

> "comparative views of other national and international courts in constitutional litigation ... particularly in private actions where litigants lack the resources to do the research necessary to provide a comprehensive comparative brief. This provides an opportunity for interveners with specialized knowledge to complement the appeal."[73]

How useful has the Court found interveners' arguments concerning international law? A review of the eight cases in Table 2 indicates three categories of cases, each suggesting different results.

The first category of cases includes those where neither the parties nor interveners cited international law, but the Court did. In *Gordon* v. *Goertz*, the facta of the parties and the interveners were silent on international law. Nevertheless, L'Heureux Dubé J., in a concurring judgment, employed international law to support her interpretation of the best interests of the child and residence issues.[74] Similarly, in *Granovsky* v. *Canada*, neither the parties nor intervener cited international law, but the Court did so in its judgment to explain its differentiation between physical impairments and

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transferred to microfiche at the Supreme Court, and the facta were not otherwise available (*Lovelace*, *supra* note 56, *Delisle* v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 [hereinafter *Delisle*] and *Baker*, *ibid.*). Table 2 sets out the statistics for the remaining 8 cases.

73 Mr. Justice John C. Major, *supra* note 5 at 27.

74 *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 at paras. 87-88 [hereinafter *Goertz*], La Forest and Gonthier JJ. concurring, see Appendix 1 at iv, below, citing the League of Nations *Declaration of the Rights of the Child* (1924), the United Nations *Declaration of the Rights of the Child* (1959), the 1989 United Nations *Convention on the Rights of the Child*, and the *Hague Convention on the Civil Aspects of International Child Abduction.*

socially constructed limitations.[75] In these two cases, it is fair to conclude that the interveners did not have a direct impact on the Court's utilization of international law.

The second category of cases includes those where the parties did not cite international law, but interveners and the Court did. There are two cases in this category.

In *Egan*, neither of the parties relied upon international law in their factum. The intervener Equality for Gays and Lesbians Everywhere (EGALE) cited a number of international documents in support of its argument that sexual orientation should be recognized as a protected ground under section 15 of the *Charter*.[76] One of these, the European Parliament's *Resolution on Equal Rights for Homosexuals and Lesbians in the European Community*, was cited by a majority of the Court in finding in favour of this argument.[77] Another intervener, the Inter-faith Coalition on Marriage and the Family, cited international law to bolster its position that sexual orientation should not be recognized,[78] but these documents were not cited by the minority of the Court that adopted this position. *Egan* is thus a case where the arguments of one of the interveners appears to have influenced the decision of the Court, even though the Court did not refer to EGALE in this part of its decision.

Another case in the second category is *Winnipeg Child and Family Services* v. *G.(D.F.)*. In this case, the parties did not cite international law, but three of the interveners did. The Catholic Group for Health, Justice

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[75] *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] S.C.R. 703 at para. 34 [hereinafter *Granovsky*], Binnie J. for the Court, see Appendix 1 at viii, below, citing the World Health Organization's *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease* (1980), and the United Nations *Decade of Disabled Persons, 1983-1992: World Programme of Action concerning Disabled Persons*.

[76] *Egan*, *supra* note 20 (Intervener Egale's Factum at para. 7). EGALE also cited the United Nations *Proclamation and Guiding Principles for the International Year of the Family* (1994), and the United Nations *Vienna International Centre NGO Committee on the Family Guiding Principles on the Family*.

[77] *Egan*, *ibid*. at 601-602, Cory J. See Appendix 1 at iii, below.

[78] *Egan*, *ibid.* (Intervener Inter-Faith Coalition on Marriage and the Family's Factum at para. 41), citing the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

and Life relied on the preamble of the *Convention on the Rights of the Child* to argue that the fetus requires legal protection.[79] This argument was accepted by the dissenting justices, who cited the United Nations *Declaration of the Rights of the Child* (1959) for the same proposition.[80] While two other interveners in the case cited international law, the documents relied upon were not referred to by the Court.[81] It appears, though, that at least one of the interveners in the case had an impact on the Court's use of international law.

The third category of cases includes those where at least one of the parties and an intervener cited international law, as did the Court. There are four cases in this category.

In *Andrews*, McIntyre J., in dissent, referred to article 14 of the *European Convention on Human Rights* in analyzing the interplay between section 15 and section 1 of the *Charter*.[82] This approach was put forward by an intervener, the Attorney General of Nova Scotia, as well as the appellant Law Society of British Columbia.[83] The other party in the case, Andrews, relied on a decision of the Court of Justice of the European Communities to support the proposition that the requirement of citizenship

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[79] *Winnipeg Child and Family Service* v. *G. (D.F.)*, *supra* note 24 (Intervener The Catholic Group for Health, Justice and Life's factum at para. 11).

[80] *Winnipeg Child and Family Services* v. *G.(D.F.)*, *ibid.* at para. 119, Major and Sopinka JJ., in dissent, see Appendix 1 at v, below. The majority did not cite international law in its reasons for decision.

[81] See *Winnipeg Child and Family Services* v. *G. (D.F.)*, *ibid.* (Interveners Women's Health Clinic, Métis Women of Manitoba, Native Women's Transition Centre, and Manitoba Association of Rights and Liberties' factum at paras. 38-40), citing art. 25 of the *Universal Declaration of Human Rights*; art. 12 of the *International Covenant on Economic, Social and Cultural Rights*; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Report of Canada Concerning the Rights Covered by Articles 10-15 of the International Covenant on Economic, Social and Cultural Rights* (1993), and the *Convention on the Elimination of all Forms of Discrimination Against Women*; *Winnipeg Child and Family Services* v. *G. (D.F.)*, *ibid.* (Intervener Association des Centres jeunesse du Québec's factum), citing the *Convention on the Rights of the Child*, the *Universal Declaration of Human Rights*, and the *Convention on the Elimination of all Forms of Discrimination Against Women*.

[82] *Andrews*, supra note 29 at 177, see Appendix 1 at i, below. The Court also referred to the 14th Amendment of the US Constitution in this regard.

[83] *Andrews*, *ibid*. (Intervener Attorney General of Nova Scotia's factum at para. 19); *Andrews*, *ibid*. (Appellant's factum at para. 13).

for lawyers is not justifiable.[84] This case was cited by La Forest J. in his concurring judgment.[85] LEAF was the only public interest intervener to refer to international law in its factum, arguing that international human rights documents should be used by the Court to decide upon analogous grounds under section 15 of the *Charter*.[86] While this point was not explicitly adopted by the Court, it did decide upon an approach to section 15 that allowed for the protection of both enumerated and analogous grounds.

In *Lavigne* v. *Ontario Public Service Employees Union*, Wilson J., in a minority judgment, distinguished a case of the European Human Rights Commission relied on by the appellant, Lavigne, to establish a freedom not to associate.[87] In a similar vein, the Canadian Labour Congress and Ontario Federation of Labour cited the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Labour Organization Convention No. 87*, all ratified by Canada, to argue that section 2(d) of the *Charter* should not be construed as encompassing the freedom not to associate.[88] While this is the position that was taken by Wilson J., she did not refer to these international treaties in support of this view.[89] La Forest J., for the plurality, cited article 20 of the *Universal Declaration of Human Rights* to buttress the finding that section 2(d) of the *Charter* includes the freedom not to associate.[90] This argument was put forward by Lavigne.[91] Thus the parties' arguments appear to have had more explicit influence than those of interveners in the use of international law in this case.

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84 *Andrews*, *ibid*. (Respondents Mark David Andrews and Gorel Elizabeth Kinersly's factum at para. 69).

85 *Andrews*, *ibid*. at 204, La Forest J., see Appendix 1 at i, below.

86 *Andrews*, *ibid.* (Intervener Women's Legal Education And Action Fund's factum at para. 53).

87 *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 255-266 [hereinafter *Lavigne*], see Appendix 1 at ii, below.

88 *Lavigne*, *ibid.* (Interveners Canadian Labour Congress and the Ontario Federation of Labour's factum at para. 18).

89 *Lavigne*, *ibid*., Wilson J. (L'Heureux-Dubé concurring), see Appendix 1 at ii, below.

90 *Lavigne*, *ibid.* at 228.

91 *Lavigne*, *ibid.* (Appelant's factum at para. 51).

In *Dunmore* v. *Ontario*, both the appellants (Dunmore and the United Food and Commercial Workers International Union) and the intervener Canadian Labour Congress relied on international law to argue that section 2(d) of the *Charter* should be interpreted so as to oblige the provincial government to include agricultural workers in its labour relations legislation.[92] A majority of the Court accepted this argument, and cited international law in support of this interpretation of section 2(d).[93] The Respondent Fleming Chicks also cited international law, arguing that section 15 of the *Charter* should not be interpreted to include occupational status as an analogous ground.[94] A majority of the Court did not deal with the section 15 issue, and in a concurring judgment, L'Heureux Dubé J. rejected the argument of the Respondent.[95] Overall, then, *Dunmore* is a case where both the arguments of the parties and the interveners appear to have influenced the Court's use of international law.

Finally, in *Gosselin* v. *Quebec*, the appellant Gosselin,[96] as well as a number of public interest interveners, cited international law to support an interpretation of sections 7 and 15 of the *Charter* and section 45 of the Quebec Charter that encompassed social and economic rights, including a positive obligation on governments to provide adequate levels of social

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92 *Dunmore*, *supra* note 18 (Appelant's factum at paras. 98-99) citing the *International Labour Organization Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers*; I.L.O. Case No. 1900, *Complaint Against the Government of Canada* (Ontario); *Dunmore*, *ibid*. (Intervener Canadian Labour Congress's factum at 9-10, 16, 20).

93 *Dunmore*, *ibid.* at paras. 27, 41 (Bastarache J.), see Appendix 1 at ix, below, citing the *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize*; the *Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers; Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*; Case No. 1900, Complaint against the Government of Canada (Ontario).

94 *Dunmore*, *ibid*. (Respondent Fleming Chicks' factum at paras. 91-93), citing the *Universal Declaration of Human Rights.*

95 *Dunmore*, *ibid*. at paras 166-170, Appendix 1 at ix, below. Justice L'Heureux Dubé did not rely on international law in her judgment.

96 *Gosselin* v. *Quebec (Attorney General),* [2002] S.C.J. 84 [hereinafter *Gosselin*] (Appelant Louise Gosselin's factum), citing the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Convention on the Rights of the Child*.

assistance.[97] Three of the five members of the Supreme Court who wrote opinions in the case cited international law. For the majority, McLachlin C.J. distinguished the language of the *International Covenant on Economic, Social and Cultural Rights* and the *Universal Declaration of Human Rights* from the language of the Quebec Charter in finding that the latter document did not support the position of the Appellant.[98] LeBel J. also cited the Covenant in agreeing with the majority's interpretation of the Quebec Charter.[99] In contrast, L'Heureux Dubé J. found that the *International Covenant on Economic, Social and Cultural Rights* closely resembled section 45 of the Quebec Charter, and substantiated the arguments of the Appellant and interveners that this document protects an adequate standard of living.[100] Thus *Gosselin* is a case where the arguments of the parties and interveners found favour with some members of the Court.

There is a fourth category of cases as well. The Court did not cite international law in 26 out of the 37 cases involving the five most frequent interveners, but in several of these cases, interveners had made arguments on this basis.[101]

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97 *Gosselin*, *ibid*. (Intervener Charter Committee on Poverty Issues' factum), citing the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of the Child*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *European Social Charter*, and several reports of international committees; *Gosselin*, *ibid*. (Intervener National Association of Women and the Law's factum), citing the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*; and a number of reports of international committees; *Gosselin*, *ibid.* (Intervener Rights and Democracy's factum).

98 *Gosselin*, *ibid*. at para. 93, McLachlin C.J. for the majority, see Appendix 1 at ix, below.

99 *Ibid*. at paras. 419-420. LeBel J. agreed with Bastarache J. (in dissent) that the Quebec legislation violated s. 15 of the *Charter*.

100 *Ibid*. at para. 147, L'Heureux Dubé J., in dissent.

101 See, for example, *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219 [hereinafter *Brooks*], see Appendix 1 at i, below, where LEAF cited the Preamble to the *Convention on the Elimination of All Forms of Discrimination Against Women* (at para. 38 of its factum); *Weatherall* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 872 [hereinafter *Weatherall*], see Appendix 1 at iii, where LEAF cited the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (at para. 37 of its factum); *Symes* v. *Canada*, [1993] 4 S.C.R. 695 [hereinafter *Symes*] (Appendix 1 at iii, below), *Thibaudeau*, *supra* note 17, see Appendix 1 at iii, below, with LEAF),

Overall, the analysis of these cases and the facta of the parties and interveners suggest that interveners are useful to the Court in presenting arguments on international law, not just in constitutional litigation, as envisioned by Justice Major, but in other areas as well.[102] It is interesting to see the reach of international law and rights discourse in this respect. At the same time, there have been many cases in the past where the Courts have not been receptive to arguments based on international law.

This may change in light of *Baker* v. *Canada (Minister of Citizenship and Immigration)*, where a majority of the Court found that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*", and broadly envisioned the scope of international documents it would entertain in this regard. Even international human rights norms that have not been implemented or adopted by Canada, and are not strictly part of Canadian law, "may help inform the contextual approach to statutory interpretation and judicial review."[103]

Importantly, the Court seems more amenable to arguments based on international law since the *Baker* decision. Both in cases with,[104] and without interveners,[105] the Court has cited international law in several recent judgments. In many cases, the international materials referred to were not binding on the Court, and included treaties that had not been incorporated into Canadian law, and reports of United Nations and other

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Eldridge v. *B.C. (Attorney General)*, [1997] 3 S.C.R. 624 (Appendix 1 at v, below) and *New Brunswick (Minister of Health and Community Services)* v. *G.* [1999] 3 S.C.R. 46 (Appendix 1 at vii, below), where the Charter Committee on Poverty Issues cited the *International Covenant on Economic, Social and Cultural Rights*.

[102] For example, *Winnipeg Child and Family Services* v. *G.(D.F.)*, *supra* note 24 did not involve constitutional issues.

[103] *Baker*, *supra* note 71 at paras 69-70, L'Heureux Dubé J. for the majority. In a concurring judgment, Iacobucci and Cory JJ. disagreed with this approach, finding that only treaties ratified and then incorporated into Canadian law by implementing legislation should be used in interpreting domestic law (at paras. 79-80). See, however, *Suresh*, *supra* note 71, where the Court unanimously adopted the majority's approach from *Baker*.

[104] *Delisle*, *supra* note 71 (Appendix 1 at vii, below); *Granovsky*, *supra* note 75 (Appendix 1 at viii, below); *Lovelace*, *supra* note 56 (Appendix 1 at viii, below); *Dunmore*, *supra* note 17 (Appendix 1 at ix, below); *Gosselin*, *supra* note 96 (Appendix 1 at ix, below).

[105] See for example *Winnipeg Child and Family Services* v. *K.L.W.*, [2000] 2 S.C.R. 519; *Nova Scotia (Attorney General)* v. *Walsh*, 2002 SCC 83.

international bodies.[106] This should serve as encouraging evidence for intervener groups to continue, or to commence using international law in their submissions. At the same time, groups must take care that such arguments are not seen as "rhetorical", as there is some suggestion that members of the Court will continue to approach non-binding international law with caution.[107]

This leads to a discussion of the most frequent intervener groups and their use of international law. For some of the groups, such arguments are routine, and part of their litigation strategies. For example, the Charter Committee on Poverty Issues cited international law in all seven of its interventions in the selected areas from 1982 to 2002. Indeed, the group's mandate is to strengthen and promote economic and social rights and positive obligations under the *Charter* using international law. While the Court has not always been explicitly receptive to such submissions, the group views the success of its arguments in the long term, and notes that its systematic use of international law is beginning to bear some fruit. For example, the Charter Committee on Poverty Issues was one of the interveners present in the *Baker* case, and was influential in arguing the "significant normative force" of non-binding international law.[108]

LEAF cited international law in approximately 1/4 of its 17 interventions in family, labour and equality rights cases from 1982 to 2002.[109] In an interview with LEAF, it was said that the group is increasingly using

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[106] See for example, *supra* note 75, Appendix 1 at viii, below, citing the World Health Organization's *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease* (1980), and the United Nations, *Decade of Disabled Persons, 1983-1992: World Programme of Action concerning Disabled Persons*; *Lovelace*, *supra* note 56, see Appendix 1 at viii, below, citing United Nations Committee on Economic, Social and Cultural Rights Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada), E/C. 12/1/Add.31, 4 December 1998 (Iacobucci J. at para. 69); *Winnipeg Child and Family Services* v. *K.L.W.*, *ibid*., L'Heureux-Dubé J. for the majority at paras. 73, 81 and Arbour J. at para. 7, in dissent, McLachlin C.J. concurring, citing the *Convention of the Rights of the Child.*

[107] See D. Gambrill, "The 'problem' of international law for the SCC" *Law Times* (22 April 2002) at 5, citing Justice LeBel's 2002 speech at a *Charter* conference in Toronto.

[108] *Baker*, *supra* note 71 (Intervener Charter Committee on Poverty Issues's factum at para. 4).

[109] These cases are: *Andrews*, *Brooks*, *Weatherall*, and *Thibaudeau*, see Appendix 1, below.

international law in its facta, partly in response to its perception that the Court appears to be more interested in hearing such arguments. LEAF is of the view that comparative law work is also important, and has been even more active in this regard.[110]

The Canadian Civil Liberties Association has referred to international law in its facta, but this is not a strategy the group uses systematically. According to the Association, it is more inclined to make comparative law arguments.[111] The Council of Canadians with Disabilities is also a group which does not often cite international law in its arguments, but it does argue comparative law, particularly at the tribunal level.[112]

Thus, at least some of the most frequent intervener groups have played a significant role in the Court's use of international law, as have other interveners. Returning to the theme of this section, the broader conclusion can be drawn that interveners have had an impact on the Court's judgments. International law is an area where there has been dialogue between the Court and public interest groups, and to the extent that international law describes norms created by international bodies, the conversation widens to include those working at the international level.

CONCLUSION

My research shows that interveners have played a significant role at the Supreme Court of Canada in the last 20 years, both in sheer number, and on a more substantive level, both in "public" and "private" areas of law. Moreover, the processes, criteria and strategies employed by frequent interveners suggests that their work is carefully chosen and created, often

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[110] Interview with LEAF, *supra* note 14. Comparative law arguments were made in 12/17 of LEAF's interventions, or 70.6%.

[111] Interview with CCLA, *supra* note 14. For an international law example, see *Kmart Canada Ltd.*, *supra* note 25 (Intervener Canadian Civil Liberties Association's factum and *Allsco Building Products Ltd*. v. *U.F.C.W., Local 1288P*, [1999] 2 S.C.R. 1136 (Intervener Canadian Civil Liberties Association's factum at paras. 35-36) where the *European Convention on Human Rights and Fundamental Freedoms* is noted. For a comparative law example, see *Winnipeg Child and Family Services* v. *G.(D.F.)*, *supra* note 24 (Intervener Canadian Civil Liberties Association's Factum) citing several American and British cases.

[112] Interview with CCD, *supra* note 14. The CCD often intervenes in tribunal hearings such as those involving the Canadian Radio and Telecommunications Commission and the Canadian Transportation Agency.

in dialogue with other public interest groups and experts. In this sense, the conversation metaphor is an apt one, although the Court has not always listened to the extent the interveners would hope. The Court's willingness to entertain submissions based on international law is one area where there is promise for a strong and productive conversation with public interest groups into the future. It is also important to recognize that interveners from a broad range of perspectives have been present before the Court, and have made submissions based on international law. The critique that there is an elite "court party" shaping the Court's discourse in a particular direction is not supported by the evidence.

While the Court's determination to control its process and prevent the misuse of interventions is understandable, there are nevertheless actions that might be taken to render the participation of interveners more effective. Courts should recognize the selectivity of most interveners, and deny applications for leave to intervene only in cases where the groups are truly "piling on" and do not meet the criteria for such applications. It should also be understood that oral argument can be critical to allow interveners to expand upon and highlight their submissions, and to respond to questions and concerns from the bench. Placing restrictions on oral argument may hamper a full and constructive dialogue between the Court and interveners. If such restrictions are made, it would be helpful for the Court to provide meaningful reasons so that public interest groups can respond to its concerns in future cases. Similarly, the explicit recognition of interveners' submissions in judicial decisions would allow the influence of interveners to be assessed more readily. Another way of ensuring the effective participation of interveners is for the Court to consider requesting their presence when leading cases are to be decided. Lastly, the federal government should consider changing the parameters of the Court Challenges Program, so that interventions in cases involving provincial legislation can be funded. This will help to ensure that interveners can participate in the full range of issues where their expertise and contextual knowledge is useful to the courts.

Appendix 1: Equality, Family and Labour Law Cases at Supreme Court of Canada With Public Interest Intervener Participation, 1982-2002

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
1. *Canadian Union of Public Employees* v. *Nova Scotia (Labour Relations Board)*, [1983] 2 S.C.R. 311	L	Nova Scotia Federation of Labour	No	N/A	
2. *Ontario (Human Rights Commission)* v. *Simpson Sears*, [1985] 2 S.C.R. 536	L	Cdn Assn for the Mentally Retarded Coalition of Provincial Organizations of the Handicapped (COPOH) Canadian Jewish Congress	Yes (Canadian Association for the Mentally Retarded and Coalition of Provincial Organizations of the Handicapped)	N/A	COPOH – No
3. *Bhinder* v. *Canadian National Railway Co.*, [1985] 2 S.C.R. 561	L	Cdn Assn for the Mentally Retarded	No	N/A	
4. *E. (Mrs.)* v. *Eve*, [1986] 2 S.C.R. 388	F	Canadian Mental Health Association Consumer Advisory Committee of Canada Cdn Assn of the Mentally Retarded	No	N/A	
5. *Law Society British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143	E, L	Federation of Law Societies of Canada Women's Legal Education and Action Fund (LEAF) COPOH Canadian Assn of University Teachers Ontario Confederation of University Faculty Associations	Yes (Canadian Assn. of University Teachers and Ontario Confederation of University Faculty Associations)	Yes (European Convention on Human Rights)	LEAF – Yes COPOH – No L.S.B.C. – Yes Andrews– No A.G.N.S.– Yes

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
6. *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219	L	LEAF	No	N/A	LEAF – Yes
7. *Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252	L	LEAF	No	N/A	LEAF – No
8. *Reference re: Workers' Compensation Act*, 1983 (Nfld), [1989] 1 S.C.R. 922	E, L	Canadian Labour Congress (CLC) Canadian National Railway Company Canadian Manufacturers'' Assn General Bakeries Ltd.	No	N/A	
9. *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530	F	Canadian Abortion Rights Action League LEAF Canadian Civil Liberties Association (CCLA) Campaign Life Coalition Canadian Physicians for Life Association des médecins du Québec pour le respect de la vie REAL Women	Yes (Canadian Physicians for Life and Association des médecins du Québec pour le respect de la vie)	N/A	LEAF – No CCLA – No
10. *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22	E, L	Cuddy Chicks Limited United Food and Commercial Workers International Union, Local 175	No	N/A	
11. *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211	L	Canadian Labour Congress (CLC) Ontario Federation of Labour National Union of Provincial Government Employees Confederation of National Trade Unions Canadian Civil Liberties Association (CCLA)	Yes (Canadian Labour Congress and Ontario Federation of Labour)	Yes (Universal Declaration of Human Rights; European Convention on Human Rights)	CLC/OFL – Yes CCLA – No Lavigne – Yes OPSEU – No

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
12. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679	E, F	LEAF Minority Advocacy Rights Council	No	N/A	LEAF – No
13. *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970	L	Seventh-day Adventist Church in Canada Canadian Labour Congress (CLC) Disabled People for Employment Equity Persons United for Self Help in Ontario (P.U.S.H.) Ontario	Yes (Disabled People for Employment Equity and Persons United for Self Help in Ontario (P.U.S.H.) Ontario)		
14. *Moge* v. *Moge*, [1992] 3 S.C.R. 813	F	LEAF	No	N/A	LEAF – No
15. *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554	L, F	Equality for Gays and Lesbians Everywhere (EGALE) Canadian Rights and Liberties Federation National Association of Women and the Law (NAWL) Canadian Disability Rights Council National Action Committee on the Status of Women (NAC) Focus on the Family Salvation Army REAL Women Evangelical Fellowship of Canada Pentecostal Assemblies of Canada	Yes (EGALE, Canadian Rights and Liberties Federation, NAWL, Canadian Disability Rights Council and NAC) (Focus on the Family, Salvation Army, REAL Women, Evangelical Fellowship of Canada, Pentecostal Assemblies of Canada)	N/A	
16. *Weatherall* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 872	E	COPOH LEAF Minority Advocacy and Rights Council	No	N/A	LEAF – Yes

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
17. *Young* v. *Young*, [1993] 4 S.C.R. 3	F	Law Society of British Columbia Seventh-day Adventist Church in Canada	No	Yes (Convention on the Rights of the Child)	
18. *P.(D.)* v. *S.(C.)*, [1993] 4 S.C.R. 141	F	Seventh-day Adventist Church in Canada	No	Yes (Convention on the Rights of the Child)	
19. *Symes* v. *Canada*, [1993] 4 S.C.R. 695	E, F	Charter Committee on Poverty Issues (CCPI) Canadian Bar Association	No	N/A	CCPI – yes
20. *Native Women's Assn. of Canada* v. *Canada*, [1994] 3 S.C.R. 627	E	Inuit Tapirisat of Canada Assembly of First Nations	No	N/A	
21. *Egan* v. *Canada*, [1995] 2 S.C.R. 513	E, F	EGALE Metropolitan Community Church of Toronto Inter-Faith Coalition on Marriage and the Family Canadian Labour Congress (CLC)	No	Yes (Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, European Parliament)	CLC – No EGALE – Yes Interfaith – Yes Parties – No
22. *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627	E, F	Support and Custody Orders for Priority Enforcement (SCOPE) Charter Committee on Poverty Issues Federated Anti-Poverty Groups of British Columbia National Action Committee on the Status of Women (NAC) LEAF	Yes (Charter Committee on Poverty Issues, Federated Anti-Poverty Groups of B.C., NAC, and LEAF)	N/A	CCPI / LEAF coalition – Yes
23. *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825	L	League for Human Rights of B'Nai Brith Canada	No	N/A	CCLA – No

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
		Canadian Civil Liberties Association (CCLA) Canadian Association of Statutory Human Rights Agencies			
24. *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27	F	LEAF	No	Yes (Convention on the Civil Aspects of International Child Abduction; Convention on the Rights of the Child; Declaration of the Rights of the Child (1924), Declaration on the Rights of the Child (1959)	LEAF – No Parties – No
25. *Battlefords and District Co-operative Ltd*. v. *Gibbs*, [1996] 3 S.C.R. 566	L	Council of Canadians with Disabilities (CCD) Canadian Mental Health Association	No	N/A	
26. *Adler* v. *Ontario*, [1996] 3 S.C.R. 609	E	Ontario Multi-Faith Coalition for Equity in Education Ontario Federation of Independent Schools Ontario Public School Boards' Assn. Canadian Civil Liberties Association (CCLA)	No	N/A	CCLA – No

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
27. *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241	E	Canadian Foundation for Children, Youth and the Law Learning Disabilities Association of Ontario Ontario Public School Boards' Assn. Down Syndrome Assn. of Ontario Council of Canadians with Disabilities (CCD) Confédération des organismes de personnes handicapées du Québec Canadian Assn. for Community Living People First of Canada Easter Seal Society	Yes (Council of Canadians with Disabilities, Confédération des organismes de personnes handicapées du Québec, Canadian Association for Community Living, People First of Canada)	N/A	
28. *Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358	E	The Federal Superannuates National Association	No	N/A	
29. *Eldridge* v. *B.C. (Attorney General)*, [1997] 3 S.C.R. 624	E	LEAF Disabled Women's Network (DAWN) Canada Charter Committee on Poverty Issues (CCPI) Canadian Association of the Deaf Canadian Hearing Society Council of Canadians with Disabilities (CCD)	Yes (LEAF and DAWN Canada), (Canadian Association of the Deaf, Canadian Hearing Society and Council of Canadians with Disabilities)	N/A	CCPI – Yes LEAF coalition – No CCD coalition – No
30. *L.S.* v. *C.S.*, [1997] 3 S.C.R. 1003	F	Seventh-day Adventist Church in Canada	No	N/A	

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
31. *Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.)*, [1997] 3 S.C.R. 925	F	Evangelical Fellowship of Canada Christian Medical and Dental Society Catholic Group for Health, Justice and Life Alliance for Life Association des Centres jeunesse du Quebec Canadian Civil Liberties Association (CCLA) Canadian Abortion Rights Action League LEAF Women's Health Clinic Métis Women of Manitoba Native Women's Transition Centre Manitoba Association of Rights and Liberties	Yes (Evangelical Fellowship of Canada and the Christian Medical and Dental Society), (Women's Health Clinic, Métis Women of Manitoba , Native Women's Transition Centre and Manitoba Association of Rights and Liberties)	Yes (Declaration of the Rights of the Child (1959))	LEAF – No CCLA – No Parties – No The Catholic Group for Health, Justice and Life – Yes Women's coalition – Yes Association des Centres jeunesse du Quebec – Yes
32. *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493	E , L	Alberta Civil Liberties Association EGALE LEAF Foundation for Equal Families Canadian Labour Congress (CLC) Canadian Bar Association -- Alberta Canadian Association of Statutory Human Rights Agencies (CASHRA) Canadian AIDS Society Alberta and Northwest	Yes (Evangelical Fellowship of Canada and Focus on the Family)	N/A	LEAF – No CCLA – No

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
		Conference of the United Church of Canada Canadian Jewish Congress Christian Legal Fellowship Alberta Federation of Women United for Families Evangelical Fellowship of Canada			
33. *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.*, [1999] 1 S.C.R. 10	E	Minority Advocacy and Rights Council Canadian Ethnocultural Council Centre for Research Action on Race Relations Canadian Centre for Philanthropy	Yes (Minority Advocacy and Rights Council, Canadian Ethnocultural Council and Centre for Research Action on Race Relations)	N/A	
34. *M.* v. *H.*, [1999] 2 S.C.R. 3	E, F	The Foundation for Equal Families LEAF EGALE United Church of Canada Evangelical Fellowship of Canada Ontario Council of Sikhs Islamic Society of North America Focus on the Family REAL Women	Yes (Evangelical Fellowship of Canada, Ontario Council of Sikhs, Islamic Society of North America and Focus on the Family)	N/A	
35. *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817	F	The Canadian Council of Churches Canadian Foundation for Children, Youth and the Law Defence for Children International-Canada Canadian Council for Refugees Charter Committee on Poverty Issues	Yes (the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees)	Yes (Convention on the Rights of the Child; Declaration of the Rights of the Child (1959))	CCPI – Yes Parties – Yes

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
36. *Delisle* v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989	L, E	The Public Service Alliance of Canada Canadian Police Association Ontario Teachers' Federation Canadian Labour Congress (CLC)	No	Yes (Convention (no. 87) Concerning Freedom of Association and Protection of the Right to Organize; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Universal Declaration of Human Rights	
37. *U.F.C.W., Local 1518* v. *KMart Canada Ltd.*, [1999] 2 S.C.R. 1083	L	Canadian Labour Congress (CLC) Canadian Civil Liberties Association (CCLA) Retail Council of Canada Coalition of B.C. Businesses Pepsi-Cola Canada Beverages (West)	No	N/A	CCLA – Yes
38. *Allsco Building Products Ltd.* v. *U.F.C.W., Local 1288P*, [1999] 2 S.C.R. 1136	L	Retail Council of Canada Canadian Labour Congress (CLC) Canadian Manufacturers' Association Canadian Civil Liberties Association (CCLA) Pepsi-Cola Canada Beverages (West)	No	N/A	CCLA – Yes

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
39. *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203	E	Aboriginal Legal Services of Toronto Congress of Aboriginal Peoples Lesser Slave Lake Indian Regional Council Native Women's Association of Canada United Native Nations Society of British Columbia	No	N/A	
40. *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3	L	LEAF, DAWN Canada Canadian Labour Congress (CLC)	Yes (LEAF, DAWN Canada Canadian Labour Congress)	N/A	LEAF/DAW N/CLC – No
41. *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46	E, F	Canadian Bar Association Charter Committee on Poverty Issues LEAF National Association of Women and the Law DAWN Canada Watch Tower Bible and Tract Society of Canada	Yes (LEAF, NAWL, and DAWN Canada)	N/A	CCPI – Yes LEAF coalition – No
42. *Kovach* v. *British Columbia (Workers' Compensation Board)*, [2000] 1 S.C.R. 55	L	United Association of Injured and Disabled Workers Vernon Injured Workers Support Group Canadian Injured Workers' Prince George Northern Vancouver Island Brain Trauma Society Ontario Network of Injured Workers' Groups	Yes (all)	N/A	

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
43. *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703	E, L	Council of Canadians with Disabilities (CCD)	No	Yes (UN Decade of Disabled Persons, 1983-1992: World Programme of Action concerning Disabled Persons; World Health Organization, International Classification of Impairments, Disabilities, and Handicaps)	CCD – No Parties – No
44. *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950	E	Council of Canadians with Disabilities (CCD) Mnjikaning First Nation Charter Committee on Poverty Issues (CCPI) Congress of Aboriginal Peoples Native Women's Association of Canada Métis National Council of Women	No	Yes (Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada), December 1998)	CCPI – Yes CCD – No
45. *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120	E	Canadian AIDS Society Canadian Civil Liberties Association (CCLA) Canadian Conference of the Arts EGALE Equality Now PEN Canada LEAF	No	N/A	CCLA – No LEAF – No

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
46. *Van de Perre* v. *Edwards*, [2001] 2 S.C.R. 1014	F	The African Canadian Legal Clinic Association of Black Social Workers Jamaican Canadian Association	Yes (African Canadian Legal Clinic, Association of Black Social Workers, Jamaican Canadian Association)	N/A	
47. *Boston* v. *Boston*, [2001] 2 S.C.R. 413	F	LEAF	No	N/A	LEAF – No
48. *Therrien (Re)*, [2001] 2 S.C.R. 3	E	Office des droits des détenus Association des services de réhabilitation sociale du Québec	Yes (Office des droits des détenus and the Association des services de réhabilitation sociale du Québec)	N/A	
49. *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016	L, E	Canadian Labour Congress (CLC) Labour Issues Coordinating Committee	No	Yes (Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers; Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize; Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development)	CLC – Yes Dunmore – Yes Ontario – No LICC – No.

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
50. *R.* v. *Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209	L	Commission de la construction du Québec, Centrale des syndicats démocratiques, Confédération des syndicats nationaux, Conseil provincial du Québec des métiers de la construction International, Fédération des travailleurs du Québec, Canadian Coalition of Open Shop Contracting Associations and Canadian Office of the Building Construction Trades Department, AFL-CIO	Yes (Centrale des syndicats démocratiques (CSD-Construction), Confédération des syndicats nationaux (CSN-Construction) and Conseil provincial du Québec des métiers de la construction (International))	N/A	
51. *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769	E, L	Center for Research-Action on Race Relations	No	Yes (International Covenant on Civil and Political Rights; Universal Declaration of Human Rights)	
52. *RWDSU, Local 558* v. *Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156	L	Canadian Labour Congress (CLC) Canadian Civil Liberties Association (CCLA)	No	N/A	
53. Berry v. Pulley, [2002] 2 S.C.R. 493	L	Canadian Labour Congress (CLC)	No	N/A	

Case	*Subject Area*	*Interveners*	*Coalition*	*International law in decision*	*International law in facta*
54. *Gosselin* v. *Quebec (Attorney General)*, [2002] S.C.J. 84	E	Rights and Democracy Commission des droits de la personne et des droits de la jeunesse NAWL Charter Committee on Poverty Issues (CCPI) Canadian Association of Statutory Human Rights Agencies (CASHRA)	No	Yes (International Covenant on Economic, Social and Cultural Rights; Universal Declaration of Human Rights)	CCPI – Yes Gosselin – Yes Quebec – No Rights and Democracy, NAWL, Commission des droits – Yes
55. *Sauvé* v. *Canada (Chief Electoral Officer)*, 2002 SCC 68	E	Canadian Association of Elizabeth Fry Societies John Howard Society of Canada British Columbia Civil Liberties Association Aboriginal Legal Services of Toronto Canadian Bar Association	Yes (Canadian Association of Elizabeth Fry Societies and John Howard Society of Canada)	Yes (European Convention on Human Rights; International Covenant on Civil and Political Rights)	

Les juges canadiens en Serbie : la remise en question des certitudes

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Ce texte est à jour au 1er janvier 2004. Il s'insère dans le cadre du projet de la Section canadienne de la Commission Internationale de Juristes portant sur l'indépendance et l'impartialité de la magistrature dans les pays du Sud-Est adriatique.

Je tiens particulièrement à remercier Me Julie Plante qui a contribué de façon significative à la recherche et à la rédaction de ce texte.

En 1998, la Section canadienne de la Commission Internationale de Juristes[1] a mis sur pied un Projet d'appui à l'indépendance et à l'impartialité des juges de la République fédérale de Yougoslavie, Projet qui a toutefois été suspendu à la suite du déclenchement des frappes de l'OTAN le 24 mars 1999 lors de la guerre du Kosovo.

Consciente des besoins réels de formation des juges dans la région, la CIJ-Canada a alors développé un Projet similaire destiné aux juges de la Croatie. Le Projet, qui a débuté en janvier 2000 pour une période de deux ans, a permis d'établir plusieurs échanges entre la magistrature croate et la magistrature canadienne.

Le succès de ce premier Projet est indéniable. L'effort de consien-isation et d'information a permis de solidifier les bases de l'indépendance et de l'impartialité des juges croates. Les résultats de cette première phase du projet continuent, même à ce jour, à se concrétiser.

L'évaluation du Projet en Croatie a convaincu la CIJ-Canada d'étendre son programme à d'autres pays du Sud-Est adriatique, dont l'État de Serbie et Monténégro[2], tout en poursuivant dans une phase deuxième le travail en Croatie. Le nouveau Projet en Serbie a débuté en 2002, également pour une période de deux ans[3].

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1 Ci-après la CIJ-Canada.

2 Nouveau nom depuis le 4 février 2003, auparavant la République Fédérale de Yougoslavie. Voir *Constitutional Charter of the State Union of Serbia and Montenegro*, aligned at the Commission meeting held on December 6th, 2002, art. 1 : « The name of the State Union is Serbia and Montenegro ».

3 À ce sujet, il est possible de consulter la documentation préparée par la CIJ-Canada, notamment COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Background Documentation, Serbia », *Regional Program to Support the Independence and Impartiality of the Judiciary in South East Adriatic Countries*,

Afin de bien comprendre le contexte dans lequel la CIJ-Canada tente de mener à terme son Projet d'appui à l'indépendance et à l'impartialité de la magistrature en Serbie, il convient de rappeler quelques événements importants :

- En 1945, le maréchal Tito forme la République fédérale populaire de Yougoslavie, composée de six républiques fédérées[4], et crée ensuite la République fédérale socialiste de Yougoslavie en 1963. Le règne du maréchal Tito s'étendra jusqu'à sa mort, en 1980.

- Le 8 mai 1989, Slobodan Milosevic, alors à la tête du Parti socialiste serbe[5], est élu président de Serbie.

- En 1990, la Slovénie déclare son indépendance de la Yougoslavie, suivie de la Croatie en juin 1991[6]. S'ensuit alors une guerre en Bosnie[7], guerre qui se termine par la conclusion de l'Accord de Dayton, signé le 14 décembre 1995 par les dirigeants de la Bosnie, de la Croatie et de la Serbie[8].

Juin 2003; COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Briefing material for Canadian judges », *Regional Program to Support the Independence and Impartiality of the Judiciary in South East Adriatic Countries*, Court Efficiency Seminars, Organised Crime Round Table, Serbie, Juin 2003. Voir également le texte écrit par l'honorable Michèle Rivet dans le cadre du colloque portant sur la Cour pénale internationale tenu à Montréal en mai 2003 : Michèle RIVET, « De la Haye à Zagreb et Belgrade : la construction de la société civile », dans INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE, *La voie canadienne vers la cour pénale internationale : tous les chemins mènent à Rome*, Les Journées Maximilien-Caron 2003, Montréal, 1er et 2 mai 2003.

4 La Bosnie-Herzégovine, la Croatie, la Macédoine, le Monténégro, la Serbie et la Slovénie.

5 Le Parti socialiste serbe est le continuateur de la Ligue communiste serbe, dont Slobodan Milosevic était le président depuis 1986.

6 Ces pays seront reconnus indépendants par les Nations Unies en 1992.

7 Voir notamment Georges CASTELLAN, *Histoire des Balkans*, Paris, Fayard, 1999, p. 562.

8 À la suite d'un cessez-le-feu intervenu entre les parties le 5 octobre 1995, des négociations se sont poursuivies à Dayton, en Ohio, entre les représentants de la Bosnie, de la Croatie et de la Serbie. De fortes pressions américaines ont finalement mené à la conclusion de l'Accord de Dayton, accord qui mit fin au conflit qui aura duré quatre années.

- Le 15 juillet 1997, Slobodan Milosevic se fait élire à la tête de la Yougoslavie, puis le 24 mai 1999, il est accusé de crimes contre l'humanité devant le Tribunal pénal international pour l'Ex-Yougoslavie mis sur pied par les Nations Unies[9].

- À partir du 24 septembre 2000, lors des élections fédérales de Yougoslavie, un énorme mouvement d'opposition tente de renverser Slobodan Milosevic, qui concède finalement sa défaite le 5 octobre 2000 en faveur d'un gouvernement de coalition regroupant 18 partis politiques[10].

- En novembre 2001, un ensemble de lois est adopté dans le domaine judiciaire, modifiant notamment la structure des cours et créant la nouvelle Division du crime organisé. Ces lois feront l'objet de plusieurs amendements en juillet 2002, amendements qui seront toutefois déclarés inconstitutionnels pour la plupart dans une décision de la Cour constitutionnelle de Serbie rendue en décembre 2002[11].

- Le 4 février 2003, l'État de Serbie et Monténégro est créé par un amendement à la Constitution[12].

- Le 12 mars 2003, le Premier ministre Zoran Djindjic est assassiné, après une première tentative ayant eu lieu peu de temps avant, au mois de février. L'état d'urgence est immédiatement déclaré,

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9 Le procès de Slobodan Milosevic ne débutera toutefois qu'en 2002. À ce sujet, voir notamment BELGRADE CENTER FOR HUMAN RIGHTS, *Human Rights in Yugoslavia 2002*, Belgrade, Vojin Dimitrijevic et Tatjana Papic, 2003, p. 463 et suiv.

10 Voir notamment COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Briefing material for Canadian judges », *loc. cit.*, note 3; et Lenard J. COHEN, *Serpent in the Bosom, The Rise and Fall of Slobodan Milosevic*, Colorado (États-Unis), Westview Press, 2001.

11 À ce sujet, voir notamment COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Background Documentation , Serbia », *loc. cit.*, note 3.

12 *Constitutional Charter of the State Union of Serbia and Montenegro*, précitée, note 2, art. 1 : « The name of the State Union is Serbia and Montenegro ».

autorisant entre autres des détentions irrégulières de 60 à 90 jours[13].

- Le 13 mars 2003, le Ministre de la Justice demande la mise à la retraite de 35 juges, par application de l'article 52 de la *Loi sur les juges*[14], ce à quoi la Présidente de la Cour suprême, la juge Leposava Karamarkovic, s'oppose en faisant valoir qu'une telle application de l'article 52 aurait un effet rétroactif inconstitutionnel[15].

- Le 19 mars 2003, de nouveaux amendements, établissant notamment un processus de destitution des juges, sont apportés aux lois adoptées en novembre 2001 et amendées une première fois en juillet 2002.

- Le 20 mars 2003, la juge Leposava Karamarkovic démissionne de son poste de Présidente de la Cour suprême. Le lendemain, la juge Sonia Bkric, à ce moment Présidente de la Cour de district de Novi Sad, est nommée Présidente de la Cour suprême.

- Le 3 avril 2003, l'État de Serbie et Monténégro accède au Conseil de l'Europe.

- Le 25 avril 2003, l'état d'urgence est levé en Serbie, alors que le droit de détention irrégulière de 60 à 90 jours était toujours en

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[13] Voir notamment COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Briefing material for Canadian judges », *loc. cit.*, note 3.

[14] *Law on Judges*, Official Gazette of the Republic of Serbia No. 63/2001, art. 52: « A judge shall be deemed to have reached the retirement years of service when reaching the age of sixty or forty years of service. »

[15] En effet, la *Loi du travail* (*Labour Law*, Official Gazette of the Republic of Serbia" No. 55/96), adoptée en 1996, prévoit à l'article 110, para. 2, que l'âge de la mise à la retraite des juges est repoussé à 67 ans. L'article 53, par. 1 de la *Loi sur les juges* (*Law on Judges*, *id.*), adoptée le 1er janvier 2002, prévoit pour sa part que l'âge de la mise à la retraite des juges ne peut dépasser 60 ans. L'application rétroactive d'une loi étant interdite par l'article XXII, par. 1 de la *Constitution de l'État de Serbie et Monténégro*, précitée, note 2, les juges qui bénéficient de la prolongation accordée par la *Loi du travail* ne peuvent se la voir retirée par la *Loi sur les juges*.

vigueur et que plus de 4 000 personnes furent arrêtées durant cette période d'un mois et demi[16].

- Alors que plusieurs dirigeants et collaborateurs de l'ancien régime continuent à occuper des postes au sein de la fonction publique serbe, une loi de « lustration »[17] est adoptée par la Serbie en mai 2003, loi qui est en vigueur depuis septembre 2003 pour une durée de dix ans[18].

- Enfin, la *Convention [européenne] de sauvegarde des droits de l'Homme et des libertés fondamentales*[19] est ratifiée par l'État de Serbie et Monténégro le 26 décembre 2003.

- Le Parti Radical serbe ultranationaliste a remporté les élections parlementaires qui se sont déroulées le 28 décembre 2003, sans toutefois pouvoir obtenir la majorité nécessaire pour former à lui seul le gouvernement.

C'est en tenant compte de tout ce passé que s'édifie actuellement l'État de droit en Serbie et que se reconstruit la société civile dans ce pays en pleine transition.

L'établissement d'un système de justice dans un contexte de transition s'avère parfois un exercice difficile et complexe parce qu'il s'édifie non pas à travers une théorie générale faisant abstraction de toute référence contextuelle, mais dans le cadre d'une dynamique sociale, politique et économique très particulière. Par conséquent, toute amorce de réforme ne peut se faire qu'en tenant compte de différents enjeux et cela, au risque même de heurter certains principes enracinés dans la culture judiciaire canadienne.

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[16] Voir notamment COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Briefing material for Canadian judges », *loc. cit.*, note 3.

[17] *Accountability for Human Rights Violations Act*, Official Gazette of the Republic of Serbia, No. 58/2003.

[18] *Id.*, art. 34(1) : « This Law shall come into force on the eighth day after its publication in the Official Gazette of the Republic of Serbia and shall apply three months after entering into force ». La Loi ayant été publiée dans la Gazette Officielle en juillet 2003 est donc applicable depuis septembre 2003. Art. 34(3): « This Law shall be applied for 10 years after entering into force ».

[19] CONSEIL DE L'EUROPE, S.T.E. n° 005, entrée en vigueur le 3 septembre 1953.

Ainsi, la mise en place de moyens judiciaires ou non judiciaires, souvent provisoires et assujettis à certaines conditions, sera nécessaire afin de mettre sur ses rails une justice qui autrement ne pourrait assurer une transition vers la démocratie. Certains de ces moyens, alors qu'ils s'avèrent nécessaires à la reconstruction de la Serbie, apparaîtront souvent aux juges canadiens tel un compromis auquel il n'est pas toujours évident de souscrire. Cela est particulièrement le cas lorsqu'il s'agit de mettre en place un processus qui, afin d'assainir le système judiciaire, vise la destitution de certains membres de la magistrature.

Il est indéniable que les juges canadiens qui participent à cette construction[20] voient certaines de leurs certitudes remises en question, particulièrement en ce qui a trait au principe d'inamovibilité, inviolable à leurs yeux en tant que garantie d'indépendance judiciaire.

En effet, principe enraciné dans la culture judiciaire canadienne, protégé notamment par l'alinéa 11d) de la Charte canadienne des droits et libertés[21], principe reconnu spécifiquement par l'article 23 de la *Charte des droits et libertés de la personne*[22] du Québec, principe clairement établi par les tribunaux[23], l'indépendance judiciaire constitue, pour les juges canadiens, un principe fondamental qui ne doit, *a priori*, faire l'objet d'aucun compromis.

L'indépendance de la magistrature au Canada est assurée par trois composantes essentielles, soit l'inamovibilité, la sécurité financière et la sécurité institutionnelle. Comme le fait remarquer Martin L. Friedland dans un rapport préparé pour le Conseil canadien de la magistrature :

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[20] Comme d'ailleurs ceux qui travaillent en Croatie.

[21] *Charte canadienne des droits et libertés*, Partie I de la *Loi constitutionnelle de 1982* [annexe B de la *Loi de 1982 sur le Canada* (1982, R.-U., c. 11)].

[22] L.R.Q., c. C-12.

[23] Voir notamment les arrêts *Valente* c. *La Reine*, [1985] 2 R.C.S. 673; *R.* c. *Beauregard*, [1986] 2 R.C.S. 56; *Mackeigan* c. *Hickman*, [1989] 2 R.C.S. 267; *R.* c. *Lippé*, [1991] 2 R.C.S. 114; *R.* c. *Généreux*, [1992] 1 R.C.S. 259; *N.B. Broadcasting Co.* c. *N.-É.*, [1993] 1 R.C.S. 319; *Ruffo* c. *Conseil de la magistrature*, [1995] 4 R.C.S. 267; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île du Prince Édouard*, [1997] 3 R.C.S. 3; *Therrien (Re)*, [2001] 2 R.C.S. 3; *Moreau-Bérubé* c. *Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249; *Mackin* c. *Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405; *Rice* c. *Nouveau-Brunswick*, [2002] 1 R.C.S. 405; *Ell* c. *Alberta*, 2003 CSC 35.

> « […] Le juge nommé à titre amovible pourrait façonner ses décisions de manière à plaire à l'autorité détenant le pouvoir de mettre fin à ses fonctions. Celui qui ne jouirait pas de la sécurité financière pourrait être tenté d'accepter des faveurs ou la promesse de faveurs de personnes ayant un intérêt dans le litige. Et si les juges ne jouissent pas d'une certaine indépendance institutionnelle, du moins en ce qui concerne l'exercice de leurs fonctions judiciaires, le pouvoir exécutif pourrait, par exemple, exercer un contrôle sur l'attribution des causes à tel ou tel juge[24]. »

Mais comment doit se comprendre le principe d'inamovibilité lorsqu'il s'agit non pas de garantir ce principe au sein d'une magistrature saine et forte, mais lorsqu'il s'agit plutôt de transformer cette magistrature et de l'assainir? Comment doit se comprendre le principe d'impartialité? Comment doit se mesurer la distance requise et l'étanchéité entre l'exécutif et le judiciaire? Telles sont là quelques-unes des questions qui se posent aux juges canadiens, qui doivent nécessairement relativiser leurs certitudes.

C'est là tout le défi de travailler dans un pays en transition.

Ainsi, à la lumière de la situation globale des réformes entreprises, les juges canadiens devront notamment remettre en question leurs certitudes relatives au principe d'inamovibilité, composante première de l'indépendance judiciaire. C'est aussi en tenant compte des divers moyens qui sont à la disposition d'un pays en transition que les juges tenteront de concilier le principe d'inamovibilité avec les exigences de souplesse qu'impose une réforme rapide et profonde.

L'examen des divers moyens utilisés par les États pour assurer leur transition vers la démocratie fera donc l'objet de notre première partie, puisqu'il est indispensable à la compréhension du processus de « lustration » mis en place en Serbie en mai 2003, avec la *Loi sur la responsabilité pour les violations des droits de la personne*[25], processus qui fera l'objet de notre deuxième partie.

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[24] Martin L. FRIEDLAND, *Une place à part : l'indépendance et la responsabilité de la magistrature au Canada*, Rapport présenté pour le Conseil Canadien de la Magistrature, 1995, p. 2.

[25] Précitée, note 17.

I. LES DIFFÉRENTS MOYENS UTILISÉS PAR LES ÉTATS POUR ASSURER LEUR TRANSITION VERS LA DÉMOCRATIE

Pour accomplir efficacement la transition dans une société, il ne faut pas uniquement transformer les institutions, il faut aussi accorder des réparations aux victimes de violations des droits de la personne et ce, non seulement pour effacer les atrocités de la mémoire collective et pour permettre aux populations affectées de retrouver la paix, mais également pour gagner la confiance du public envers les nouvelles institutions démocratiques.

Le passage vers la démocratie ne peut s'effectuer qu'en prenant en compte un double objectif, soit celui de réparer les violations du passé et celui de reconstruire une société égalitaire.

Parmi les principales approches utilisées par les pays en transition, retenons notamment les programmes de restitution des biens, l'établissement de la vérité par des moyens non judiciaires tels les commissions de vérité, les poursuites pénales nationales ou internationales des auteurs de violations des droits de la personne et la destitution de ceux-ci de leur poste au sein du pouvoir étatique, le cas échéant, à l'aide de lois de « lustration »[26].

A. Les programmes de restitution des biens ou de compensation monétaire

Déjà en 1995, la République fédérale de Yougoslavie reconnaissait, en signant l'Accord de Dayton, l'importance, pour atteindre une situation de paix durable, du rétablissement des réfugiés et des personnes autrement déplacées dans leur propriété d'origine[27].

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[26] À propos des différents moyens à la disposition des États pour assurer leur transition vers la démocratie, voir notamment Priscilla HAYNER, « Justice in Transition: Challenges and Opportunities », Presentation to the 55th Annual DPI/NGO Conference, *Rebuilding Societies Emerging from Conflict: A Shared Responsibility*, Nations Unies, New York, 9 septembre 2002.

[27] Accord de Dayton, article VII.

> « Recognizing that the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace, the Parties agree to and shall comply fully with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6, as well as

Ainsi, l'article 1 de l'Annexe 7 de l'Accord de Dayton prévoit que tous les réfugiés ou les personnes autrement déplacées ont le droit de retourner librement dans leur propriété d'origine, ou d'être indemnisés dans les cas où ladite propriété ne peut être restituée et ce, de façon sécuritaire, sans risque de harcèlement ou d'intimidation, de persécution ou de discrimination[28].

Le morcellement de l'Ex-Yougoslavie a en effet entraîné le déplacement de plus de 1.3 millions de personnes, dont plus de 800 000 étaient toujours, en 2002, éparpillées un peu partout à travers la République fédérale de Yougoslavie, la Croatie et la Bosnie-Herzégovine[29].

> the provisions concerning refugees and displaced persons set forth in Chapter One of the Agreement at Annex 7. »

L'État de Serbie et Monténégro, en adoptant en 2003 l'article 23 du *Charter on Human and Minority Rights and Fundamental Freedoms* (partie intégrante de la *Constitution de l'État de Serbie et Monténégro*, précitée, note 2), a par ailleurs réitéré le droit de toute personne à la propriété, qui comprend le droit de ne pas être privé de ses biens. Voir également, à propos des programmes de restitution des propriétés, Catherine LU, « Victimhood, Retribution and the Project of Moral Regeneration », dans INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE, *op. cit.*, note 3.

[28] « **Chapter One: Protection**

Article I: Rights of Refugees and Displaced Persons

> All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.
>
> The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion. »

[29] Ces informations nous proviennent du site Internet de l'Organisation pour la Sécurité et la Coopération en Europe (ci-après l'OSCE) relatif à la mission de l'Organisation en Bosnie : http://www.oscebih.org/human_rights/property.asp.

Selon l'Organisation pour la Sécurité et la Coopération en Europe (OSCE), la procédure de retour est freinée par un manque de respect des droits fondamentaux, dont le droit à la possession de ses biens[30], garanti notamment par l'article 1 du *Protocole additionnel à la Convention de sauvegarde des Droits de l'Homme et des Libertés Fondamentales*[31].

Le problème de la restitution des propriétés est une question très épineuse en Serbie. Malgré tout, aucune loi s'y rapportant n'a encore été adoptée.

La principale question qui occupe les autorités serbes pour l'instant est la restitution des immeubles à logements. En effet, non seulement ces immeubles ont-ils été nationalisés, mais les appartements qu'ils renferment ont été loués, sous l'ancien régime, à certaines personnes privilégiées. Des familles vivent donc dans ces appartements depuis des décennies et n'ont aujourd'hui aucun autre endroit où habiter.

Dans ce contexte, la restitution des immeubles devient un double problème puisque l'État ne doit pas seulement retourner les immeubles à leurs propriétaires d'origine, mais doit également trouver une solution pour les gens qui habitent ces immeubles. Avec des moyens financiers limités, le problème demeure entier.

Un autre problème majeur auquel fait face la Serbie est la restitution des usines à leurs propriétaires d'origine, usines qui ont été investies par l'État à partir de 1945.

Comment évaluer la valeur de l'usine à l'époque où elle appartenait à son ancien propriétaire et sa valeur actuelle? Alors que l'État de Serbie a proposé une compensation monétaire, les propriétaires réclament une restitution en nature. Encore une fois, le problème demeure entier[32].

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30 *Id.*

31 Conseil de l'Europe, S.T.E. n° 009, entré en vigueur le 18 mai 1954 :

« Article 1 – Protection de la propriété

Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international. »

32 Ces informations nous ont été transmises par Svetlana Vukomanovic, Coodinatrice de programme au Center for Democracy Foundation de Belgrade.

Selon l'OSCE, deux éléments sont très importants dans la réussite d'un programme de restitution des propriétés. D'abord, une saine structure légale permettant aux réfugiés et aux personnes autrement déplacées de reprendre possession de leur propriété et instaurant un programme de compensation dans les cas où les propriétés ne peuvent être retournées à leurs propriétaires d'origine. Deuxièmement, un système judiciaire neutre, c'est-à-dire qui n'a pas de préjugé ou d'apparence de préjugé face aux victimes qui désirent reprendre possession de leurs biens[33].

Mais comment restituer la propriété de personnes déplacées alors que d'autres y demeurent parfois depuis des décennies? Et qu'en est-il lorsque ces seconds occupants sont décédés et que leurs descendants y vivent maintenant de façon légitime? Plus problématique encore, comment résoudre ces questions de restitution des propriétés privées alors que celles-ci ont été nationalisées sous l'ancien régime? Un juge peut-il décider d'évincer un occupant légitime au profit de l'occupant d'origine, alors que le propriétaire actuel de cette propriété est peut-être l'État? Un large programme de compensation monétaire serait-il plus approprié? Et qu'en est-il si l'on pense que dans un contexte de transition, les ressources doivent être utilisées avec parcimonie?

Ce ne sont là que quelques-unes des questions qui démontrent l'ampleur du problème auquel doivent faire face les États en transition et qui nous permettent d'affirmer que le problème de restitution des propriétés est sans doute, pour ces sociétés, un des problèmes les plus importants.

B. Les commissions de vérité

Pour implanter solidement les bases d'un État de droit dans un pays en transition, il ne suffit toutefois pas d'accorder des réparations de nature économique aux victimes de violations des droits de la personne, il faut également prévenir la répétition de ces violations.

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[33] En effet, selon l'OSCE, les réfugiés ou les gens autrement déplacés hésitent souvent à retourner dans leur lieu de résidence d'origine par peur des arrestations et des détentions arbitraires.

La Commission des droits de l'homme des Nations Unies reconnaît que la prévention de la répétition des crimes passe, entre autres, par la divulgation complète de la vérité[34], divulgation qui constitue également un élément essentiel de la transition vers la démocratie[35].

C'est dans ce double objectif de reconnaissance des violations passées des droits de la personne et de transition vers la démocratie que plusieurs États ont choisi de mettre sur pied une commission de vérité[36] dont l'une des principales fonctions consiste à enquêter sur les faits se rapportant aux violations des droits de la personne, à l'intérieur d'un espace-temps déterminé, puis d'émettre un rapport officiel complet sur ces événements

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[34] *(Projet de) Principes fondamentaux et directives concernant le droit à réparation des victimes de violations [flagrantes] des droits de l'homme et du droit international humanitaire*, Commission des droits de l'homme, Nations Unies, avril 1997, principe 15 :

> **« 15. Satisfaction et garanties de non-renouvellement** doivent être prévues, y compris, si nécessaire :
>
> (b) Vérification des faits et divulgation publique et complète de la vérité;
>
> Excuses, notamment reconnaissance publique des faits et acceptation de responsabilité;
>
> Inclusion dans la formation aux droits de l'homme et dans les livres d'histoire ou les manuels scolaires d'un compte rendu fidèle des violations commises dans le domaine des droits de l'homme et du droit international humanitaire. »

[35] Voir notamment Phenyo Keiseng RATAKE, « Transitional Justice in South Africa and the Former Yugoslavia—A Critique », dans HISTORY WORKSHOP AND THE CENTRE FOR STUDY OF VIOLENCE AND RECONCILIATION, *TRC: Commissioning the Past*, Johannesbourg, 11-14 juin, 1999, p. 8 :

> « Failure on the part of a new government to deal with past human rights violations often has drastic consequences for the birth of the new society. It is important for a society to reconcile itself with its past. A society which deliberately ignores its past human rights violations is sitting on a bomb which may go off at any time. […] societies which deliberately ignore the legacy of past human rights violations such as Rwanda and the former Yugoslavia leave behind myths, half-truths, speculations, guilt and denials. These uncertainties create a 'thick wall' between perpetrators and victims. Such a 'thick wall' results in a shaky foundation for a new society because 'the beast is not looked in the eye'. In order to 'look the beast in the eye' it is important to know the causes of the problem, so as to deal with the symptoms. »

[36] Parmi les pays qui ont mis sur pied une commission de vérité, notons, entre autres, le Rwanda, l'Argentine, le Guatemala, le Brésil, le Salvador, le Chili et le Zimbabwe.

de même que des recommandations quant à la façon d'éviter qu'ils ne se répètent dans le futur[37].

Pour accomplir cette tâche, les commissions de vérité recueillent divers documents et entendent les victimes autant que les auteurs des crimes à propos desquels il y a enquête.

N'étant pas soumises aux règles de procédure et de preuve applicables devant les tribunaux, les commissions de vérité ont notamment l'avantage de faire ressortir des vérités plus larges et plus complètes que celles qui émergent lors d'un procès.

En outre, les commissions de vérité permettent d'appréhender un plus grand nombre d'auteurs de violations des droits de la personne que les poursuites judiciaires, ces dernières étant restreintes par l'insuffisance de preuve, l'absence de compétence des tribunaux locaux, les catégories d'actes criminels punissables, etc.

Les commissions de vérité ont par ailleurs un certain pouvoir thérapeutique sur les victimes puisqu'elles exposent les événements passés à partir de leur perspective. Les victimes ont la possibilité de s'exprimer librement sur ce qu'elles ont vécu, leur témoignage n'étant pas restreint, comme c'est le cas dans le contexte d'une procédure judiciaire, par les questions des procureurs.

Dans certains États, tel le Rwanda, la commission de vérité est accompagnée d'une procédure d'amnistie afin d'inciter les auteurs de violations des droits de la personne à dévoiler tous leurs actes[38]. Cette décision des pouvoirs publics constitue en fait un compromis permettant aux auteurs de violations des droits de la personne de se confesser sans

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[37] Au sujet des commissions de vérité, voir notamment Priscilla HAYNER, « 15 Truth Commissions—1974 to 1994: A Comparative Study », (1994) 16(4) *Human Rights Quarterly* 597; P. K. RATAKE, *loc. cit.*, note 35; William A. SCHABAS, « Addressing Impunity in Developing Countries: Lessons from Rwanda and Sierra Leone », dans INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE, *op. cit.*, note 3.

[38] À ce sujet, voir notamment P.K. RATAKE, *id.*; W.A. SCHABAS, *id.*; G. THEISSEN, « Supporting Justice, Co-Existence and Reconciliation aft… : Strategies for Dealing with the Past », dans BERGHOF RESEARCH CENTER FOR CONSTRUCTIVE CONFLICT MANAGEMENT, *The Berghof Handbook for Conflict Transformation*, 2000 : http://www.berghof-center.org/handbook/theissen/abstract.htm.

crainte de poursuite judiciaire, et aux victimes d'avoir accès à un récit des faits le plus complet possible[39].

L'amnistie doit toutefois être limitée aux personnes ayant participé aux conflits armés seulement, et ne doit pas s'appliquer aux auteurs de génocides, de crimes de guerre, de crimes contre l'humanité ou d'autres violations flagrantes des droits de la personne, telles les tortures et les disparitions forcées, sans quoi elle serait contraire au droit pénal international[40].

Dans les cas où la procédure d'amnistie ne peut être appliquée, comme dans les cas où elle n'est pas du tout envisagée par l'État, la commission de vérité permettra malgré tout de rassembler des éléments de preuve pouvant servir à d'éventuelles poursuites judiciaires.

C. Les poursuites pénales des auteurs de violations des droits de la personne

Différents instruments internationaux de protection des droits de la personne, telles les quatre Conventions de Genève[41], la Convention sur le génocide[42], Le *Pacte international relatif aux droits civils et politiques*[43] et la Convention contre la torture[44] prévoient que les violations flagrantes des

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[39] Il est important toutefois de s'assurer que l'amnistie n'entraîne pas l'annulation des obligations de l'État face au droit à la réparation des victimes de violations des droits de la personne, telle la mise sur pied d'un programme de compensation monétaire, par exemple.

[40] Voir *infra*, partie 3 – Les poursuites pénales des auteurs de violations des droits de la personne.

[41] *Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*; *Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer*; *Convention de Genève relative au traitement des prisonniers de guerre*; *Convention de Genève relative à la protection des personnes civiles en temps de guerre*, adoptées par la Conférence diplomatique de Genève le 12 août 1949, entrées en vigueur le 21 octobre 1950.

[42] *Convention pour la prévention et la répression du crime de génocide*, (1951) 78 R.T.N.U. 277, [1949] R.T.Can. n° 27.

[43] *Pacte international relatif aux droits civils et politiques*, (1976) 99 R.T.N.U. 171, [1976] R.T.Can. n° 47.

[44] *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, Doc. N.U. A/39/51 (1984), p. 197, [1987] R.T.Can. n° 36.

droits de la personne, les génocides, les crimes de guerre et les crimes contre l'humanité doivent faire l'objet d'une enquête, les États ayant l'obligation de poursuivre leurs auteurs en justice[45].

Par ailleurs, la Commission des droits de l'homme des Nations Unies, dans son Projet de Principes fondamentaux et directives concernant le droit à réparation des victimes des violations [flagrantes] des droits de l'Homme et du droit international humanitaire, fait expressément mention du devoir des États de faire respecter les droits de la personne et le droit international humanitaire[46].

La Cour européenne des droits de l'homme a pour sa part rendu, en mars 2001, une décision concluant que la *Convention [européenne] de sauvegarde des droits de l'Homme et des libertés fondamentales*[47] « implies a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions »[48].

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[45] À ce sujet, voir notamment William A. SCHABAS, *loc. cit.*, note 37.

[46] Précité, note 34, principes 1 et 2 :

> « **Devoir de respecter et de faire respecter les droits de l'homme et le droit international humanitaire**
>
> Selon le droit international, tout État a le devoir de respecter et de faire respecter les droits de l'homme et le droit international humanitaire.
>
> **Portée de l'obligation de respecter et de faire respecter les droits de l'homme et le droit international humanitaire**
>
> L'obligation de respecter et de faire respecter les droits de l'homme et le droit international humanitaire comprend le devoir de lutter contre les violations, d'enquêter sur celles-ci, de prendre les mesures appropriées contre leurs auteurs et d'assurer recours et réparations aux victimes. La lutte contre les violations flagrantes des droits de l'homme et du droit international humanitaire et le devoir de poursuivre et de punir les auteurs d'actes constitutifs de crimes au regard du droit international doivent faire l'objet d'une attention particulière. »

[47] Précitée, note 19.

[48] *Streletz, Kessler and Krenz* v. *Germany*, Cour européenne des Droits de l'Homme, 22 mars 2001, par. 86.

La Serbie, en adoptant la *Loi sur l'organisation et la juridiction des autorités gouvernementales dans les poursuites des auteurs de crimes de guerre*[49] en juin 2003, a mis en place un cadre légal et institutionnel nécessaire à la bonne marche des procès pour crimes de guerre.

Cette loi très innovatrice crée, entre autres, l'Office du procureur public pour les crimes de guerre, le Service d'enquête sur les crimes de guerre, la Division des crimes de guerre de la Cour de district de Belgrade et l'Unité de détention spéciale pour les auteurs de crimes de guerre. Cette loi met également en place quelques nouveautés sur le plan procédural, tel le témoignage par vidéo et l'enregistrement audio des procès.

Les juges affectés à la Division des crimes de guerre sont des juges de la Cour de district de Belgrade nommés par le président de celle-ci. Pour l'instant, six juges d'instruction et deux juges enquêteurs ont été nommés. Ces huit juges sont responsables de la Division des crimes de guerre pour tout le territoire de la Serbie et utiliseront, avec les juges qui seront affectés à la Division du crime organisé, les salles de cour du nouveau bâtiment abritant le Tribunal spécial pour la lutte contre le crime organisé, dont une des salles de cour a été inaugurée le 20 décembre 2003 par le Ministre de la Justice de la Serbie, Vladan Batic[50].

Aucune formation en matière de crimes de guerre n'est obligatoire, mais certains des juges nommés ont assisté à des séminaires sur les crimes de guerre. À cet égard, d'autres séminaires seront organisés notamment

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[49] *Law on the Organization and Jurisdiction of Government Authorities in Prosecution of Perpetrators of War Crimes*, texte traduit en anglais par l'OSCE, disponible dans COMMISSION INTERNATIONALE DE JURISTES (Section canadienne), « Background Documentation, Serbia », *loc. cit.*, note 3.

[50] Cette nouvelle salle de cour a été construite en un temps record de 69 jours, en conformité avec les plus hauts standards en matière de sécurité et d'équipements techniques. D'une superficie de 900 mètres carrés, cette salle de cour peut recevoir jusqu'à 550 personnes. Elle est constituée d'une partie centrale, où prennent place le juge, les avocats et les huissiers, d'une aire entourée d'une vitre anti-balle pour l'accusé, et d'un balcon destiné à recevoir le public. Des salles de presse spéciales ont également été prévues pour les journalistes qui couvrent les procès. Cette salle de Cour, selon le Ministre de la Justice Vladan Batic, est une réponse de la Serbie démocratique face au crime organisé et abritera le procès pour le meurtre de l'ancien Premier ministre de Serbie Zoran Djindjic.

par l'OSCE et par les juges du Tribunal pénal international pour l'Ex-Yougoslavie[51].

Il est indéniable que les poursuites pénales des auteurs de violations des droits de la personne, tout comme le processus de « lustration » dont nous discuterons ci-après, posent le problème de la rétroactivité des punitions, rétroactivité qui est contraire aux droits fondamentaux[52]. Mais une véritable lutte contre l'impunité dans les pays en transition ne peut évacuer la nécessité de panser les plaies et de s'attaquer aux sources de violations.

À l'aide de certaines techniques d'interprétation judiciaire, ce retour en arrière peut être effectué de façon démocratique, sans violation du principe de non-rétroactivité des lois.

D'abord, il est possible de soutenir que les lois en vertu desquelles certaines personnes ont commis des violations des droits de la personne étaient elles-mêmes soumises à d'autres lois, supérieurement hiérarchiques, qui interdisaient ces violations. Trois types de lois supérieures

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[51] Ces informations nous proviennent de la juge Radmila Dicic, de la Cour de district de Belgrade.

[52] Voir notamment l'article 20 de la *Charte des droits de la personne, des minorités et des libertés fondamentales*, partie intégrante de la *Constitution de l'État de Serbie et Monténégro*, précitée, note 2, qui interdit la rétroactivité des lois, de même que l'article XXII de la *Constitution de l'État de Serbie et Monténégro*, précitée, note 2, qui permet toutefois la rétroactivité des lois si l'intérêt public le justifie :

> « **Prohibition of retroactivity, punishment only on the basis of law**
>
> **Article 20**
>
> No one shall be considered guilty or punished for an act that was not prescribed by law as punishable before it was committed.
>
> The punishments are determined in accordance with the law that prevailed at the time when the act was committed, except if the later law is more favourable for the perpetrator.
>
> **XXII**
>
> **RETROACTIVITY**
>
> The Laws and other acts issued by the institutions of Serbia and Montenegro cannot be retroactive.
>
> Exceptionally, if required by the public interest established in the process of law enactment, certain provisions of the Law can be retroactive. »

peuvent être invoquées, selon le cas, soit les lois constitutionnelles, les lois internationales[53] et les lois de justice naturelle.

Une autre façon de résoudre le problème de la rétroactivité est le cas où le législateur peut adopter une loi d'interprétation par laquelle il déclarera que le droit positif qui prévalait sous l'ancien régime, malgré les apparences, n'a jamais autorisé les actes reprochés.

Ou encore, au lieu d'adopter une loi d'interprétation, le législateur peut allonger rétroactivement les délais de prescription prévus dans les lois permettant la punition des auteurs de violations des droits de la personne dans la mesure, bien entendu, où de telles lois existaient au moment de la commission des actes reprochés[54].

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[53] L'article 15 du *Pacte international relatif aux droits civils et politiques*, précité, note 43, est intéressant à cet égard puisqu'il prévoit que rien ne s'oppose à la condamnation d'un individu pour des actes considérés comme criminels selon les principes de droit international alors que cet acte ne constitue pas un crime en vertu du droit interne :

> « **Article 15**
>
> Nul ne sera condamné pour des actions ou omissions qui ne constituaient pas un acte délictueux d'après le droit national ou international au moment où elles ont été commises. […]
>
> Rien dans le présent article ne s'oppose au jugement ou à la condamnation de tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels, d'après les principes généraux de droit reconnus par l'ensemble des nations. »

La Serbie, sous l'ancien régime, a adhéré à plusieurs instruments internationaux de protection des droits de la personne, dont le *Pacte international relatif aux droits civils et politiques*.

[54] À propos du problème de la rétroactivité des lois et de la façon d'y faire face, voir notamment Eric A. POSNER et Adrian VERMEULE, *Transitional Justice as Ordinary Justice*, Chicago, 2003 : http://www.law.uchicago.edu/faculty/posner-e/resources/eap-av.transitional.pdf, p. 22 suiv. Selon eux, ces différentes techniques consistent simplement à prendre l'ancien régime aux mots :

> « […] When the new regime's court ignore the law in action in favor of the nominal law, or treat the old regime's international commitments as good-faith obligations, they are merely holding the old regime to its word. […] the appeal to international norms weakens the wrongdoers' argument that the retroactive punishment comes as an unfair surprise; […] A similar point holds for retroactive extensions of statutes of limitations, which only apply to those who have, after all, violated underlying substantive law that was in effect when they violated it. »

L'impunité ébranle le principe d'État de droit, constitue un affront à la justice et peut mener à un manque de confiance de la population envers la nouvelle démocratie.

À l'inverse, le fait, pour un gouvernement, d'intenter des poursuites judiciaires contre les auteurs de violations des droits de la personne envoie un message clair selon lequel nul n'est au-dessus de la loi et contribue à dissuader les éventuels futurs criminels[55].

Les poursuites judiciaires permettent également d'individualiser les coupables en les sanctionnant individuellement. Comme le fait remarquer l'auteur Richard Goldstone, ce processus d'individualisation est très important dans la prévention de la haine à l'endroit de peuples entiers :

> « […] When one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the Germans – the people who produced Goethe or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazi's being ascribed to the whole German people[56]. »

Toutefois, le corollaire du devoir de poursuivre en justice les auteurs de violations flagrantes des droits de la personne est l'obligation de s'assurer que la justice sera rendue conformément aux standards internationaux, notamment en matière d'indépendance et d'impartialité des juges.

Or, l'affaiblissement du système judiciaire, phénomène qui touche la plupart des pays en transition, peut provoquer une déstabilisation de l'indépendance de la magistrature, déstabilisation qui peut résulter, entre autres, d'une peur ou d'une intimidation des juges, d'une partialité politique des juges et des procureurs, ou encore d'un manque de ressources et de connaissances.

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[55] P.K. RATAKE, *loc. cit.*, note 35, p. 12. Voir également William A. SCHABAS, « Réconciliation nationale et poursuites pénales : comment résoudre cette équation dans le respect des droits fondamentaux et de la démocratie? », dans CENTRE INTERNATIONAL DES DROITS DE LA PERSONNE ET DU DÉVELOPPEMENT DÉMOCRATIQUE, *Campagne contre l'impunité : Portrait et Plan d'action*, Montréal, 1997, p. 237.

[56] Cité dans P.K. RATAKE, *id.*, p. 26.

C'est dans ce contexte que la communauté internationale a mis sur pied des tribunaux internationaux responsables de poursuivre les auteurs de crimes de guerre subsidiairement aux tribunaux domestiques, c'est-à-dire lorsque les États ne sont pas en mesure ou ne veulent pas traduire en justice les responsables ou les auteurs de crimes de guerre.

À cet égard, mentionnons notamment la Cour pénale internationale, créée par le Statut de Rome[57], et le Tribunal pénal international pour l'Ex-Yougoslavie, mis sur pied par les Nations Unies[58].

Le Tribunal pénal international pour l'Ex-Yougoslavie exerce sa compétence de façon concurrente avec les juridictions nationales serbes, en ayant toutefois primauté sur ces dernières et il peut, dans l'intérêt de la justice, non seulement transférer des dossiers au niveau national, mais également demander le dessaisissement d'une juridiction nationale dans une enquête ou une affaire donnée s'il juge que le procès ne se déroule pas selon les standards internationaux[59].

Le Tribunal pénal international pour l'Ex-Yougoslavie prévoit terminer ses enquêtes à la fin de 2004, finir ses procès de première instance en 2008 et ses procédures d'appel en 2010, les autorités nationales devant prendre la relève à ce moment. L'amélioration de l'efficacité

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[57] *Statut de Rome de la Cour pénale internationale*, A/CONF. 183/9 du 17 juillet 1998, entré en vigueur le 1er juillet 2002. La juridiction de la Cour n'est applicable qu'aux crimes commis après l'entrée en vigueur du statut. Pour le texte intégral du statut, voir le site Internet des Nations Unies, à l'adresse suivante: http://www.un.org/law/icc/statute/french/rome_statute(f).pdf. Pour plus d'informations, voir également les actes du colloque portant sur la Cour pénale internationale, organisé par l'Institut canadien d'administration de la Justice, dans le cadre des Journées Maximilien-Caron, tenu à Montréal en mai 2003.

[58] En vertu de la Résolution 827 adoptée par le Conseil de Sécurité des Nations Unies le 25 mai 1993, en réponse à la menace pour la sécurité internationale représentée par les violations graves du droit international humanitaire commises sur le territoire de l'Ex-Yougoslavie depuis 1991. Pour plus d'informations sur le Tribunal pénal international pour l'Ex-Yougoslavie, voir le site Internet des Nations Unies, à l'adresse suivante : http://www.un.org/icty/index-f.html, de même que le site Internet de l'OSCE, à l'adresse suivante : http://www.osce.org/documents/fry/2003/11/1156_en.pdf.

[59] Aucune disposition législative ne prévoit quels dossiers peuvent être transférés au niveau domestique ou être retirés des juridictions nationales, et cela dépendra des choix politiques. Ces informations nous ont été transmises par la juge Radmila Dicic, de la Cour de district de Belgrade.

du système judiciaire serbe devient donc un objectif de première importance.

Selon l'OSCE, un des éléments nécessaires au succès de la Serbie dans sa croisade contre l'impunité est l'intégration de la doctrine de la responsabilité des commandants, développée par le Tribunal pénal international pour l'Ex-Yougoslavie[60].

Cette doctrine, selon laquelle les commandants doivent être tenus responsables des actes de leurs subordonnés, s'applique non seulement aux commandants militaires, mais a également été étendue par le Tribunal aux dirigeants civils.

Or, la *Loi sur l'organisation et la juridiction des autorités gouvernementales dans la poursuite des auteurs de crimes de guerre*[61] ne fait aucune référence à la doctrine de la responsabilité des commandants.

Alors que la doctrine de la responsabilité des commandants permet de pallier au problème de preuve fréquemment rencontré en matière de crimes de guerre, il est légitime de se demander si cette déficience de la loi constituera un obstacle au succès de la Serbie dans sa lutte contre les violations des droits de la personne.

D. Le processus de « lustration »

Afin de restaurer la confiance du public envers les nouvelles institutions démocratiques, notamment envers le système judiciaire, certains États[62], dont la Serbie, ont pris l'initiative de démettre de leurs fonctions les personnes qui occupent ou sont candidats à un poste au sein de la fonction publique ou de la magistrature et qui ont participé aux violations des droits de la personne commises sous l'ancien régime.

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[60] Voir notamment le rapport de l'OSCE relatif aux crimes de guerre, disponible sur le site Internet de l'Organisation, à l'adresse suivante : http://www.osce.org/documents/fry/2003/11/1156_en.pdf.

[61] Précitée, note 49.

[62] Parmi les États ayant adopté des lois de « lustration », notons entre autres la Tchécoslovaquie, la Pologne et la Hongrie.

En effet, comment un système judiciaire peut-il être crédible si les juges qui doivent décider de la culpabilité des auteurs de violations des droits de la personne sont les mêmes que ceux qui ont autorisé ces crimes par le passé?

L'adoption de lois dites de « lustration » est une des façons de mettre en œuvre ce processus de destitution.

La notion de «lustration», est un concept propre aux pays du bloc communiste. Ce terme vient du latin *lustrare*, qui signifie purifier par le feu, ou encore clarifier les choses en les soumettant à la lumière. Plus concrètement, la « lustration » est la détermination judiciaire ou administrative qu'une personne a participé aux violations des droits de la personne commises sous l'ancien régime et la punition, pour pareille activité, consiste en la dénonciation publique et au congédiement du poste occupé.

La Commission des droits de l'homme des Nations Unies a d'ailleurs reconnu l'importance des sanctions administratives, autant que judiciaires, dans la prévention de la répétition des violations des droits de la personne[63].

Le processus de « lustration » peut revêtir diverses formes, selon l'État où il est mis sur pied.

D'abord, la « lustration » peut être individuelle ou elle peut être collective. Dans le premier cas, dès qu'il est établi qu'une personne a participé aux violations des droits de la personne, celle-ci doit démissionner de son poste, sous peine de dénonciation publique[64].

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[63] *Projet de Principes fondamentaux et directives concernant le droit à réparation des victimes des violations [flagrantes] des droits de l'homme et du droit international humanitaire*, précité, note 34, article 15e) :

> « **15. Satisfaction et garanties de non-renouvellement** doivent être prévues, y compris, si nécessaire :
>
> Sanctions judiciaires ou administratives à l'encontre des personnes responsables des violations. »

[64] C'est du moins ce qui est prévu par la *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17.

La « lustration » collective, pour sa part, consiste à déterminer des groupes de personnes pour lesquels il sera dorénavant interdit d'occuper un poste au sein de la fonction publique. Dans cette dernière hypothèse, il ne s'agit pas de déterminer si une personne, individuellement, a participé aux violations des droits de la personne, mais seulement de savoir si cette personne fait partie d'un des groupes identifiés par la loi de « lustration ».

Dans l'affirmative, cette personne sera démise de ses fonctions, à moins de parvenir à faire valoir qu'elle est l'exception qui n'a participé à aucune violation des droits de la personne, l'exception qui ne représente aucune menace pour la nouvelle société démocratique et qui, par conséquent, ne devrait pas faire partie du groupe.

La plupart du temps toutefois, il n'existe aucun moyen de faire valoir son innocence. Et s'il en existe un, celui-ci n'offrira que peu ou pas de garanties procédurales et partira d'une présomption de culpabilité – la présomption d'innocence n'étant pas valable – mettant le fardeau de preuve sur les épaules de celui qui veut faire valoir qu'il ne devrait pas être inclus dans le groupe.

Enfin, la « lustration » peut être totale, c'est-à-dire viser toutes les personnes ayant participé, de près ou de loin, tant de façon passive qu'active aux violations des droits de la personne, ou ne viser que les initiateurs ou les personnes ayant participé activement à ces violations.

Jusqu'à présent, l'histoire nous a démontré que les États ayant adopté des lois de « lustration » sont ceux pour lesquels la transition vers la démocratie s'est effectuée avec le plus de succès :

> « A fine natural experiment is provided by Czechoslovakia, which enacted harsh lustration laws in 1991. These laws were inherited by the Czech Republic but not Slovakia when the two nations split. [T]here is no doubt that [the lustration law] did keep a number of highly compromised persons out of public life in Czech lands, while such persons remained to do much damage in Slovakia. […] Indeed, these persons re-established an authoritarian regime in Slovakia, one that has only recently begun to thaw, while in the Czech Republic the transition to a liberal democracy has been smooth and steady. […] In Poland there was initially no lustration law but after a series of scandals involving high officials who were believed to have been collaborators – one such scandal cause the fall of the government – a lustration law was created in 1998. […]

> The optimistic view there that a thick line could be drawn between present and past was initially supported by the public but has since been repudiated, and the new lustration law enjoys popularity […] The other success stories – the former GDR and Hungary – also enacted lustration laws, although after much delay and milder than the Czech Republic's. By contrast, the failures and partial failures – Russia and its satellites – had no significant lustration laws. This pattern must disappoint those who believed that Spain's smooth purge-free transition would provide the model for the successful transitions after 1989[65]. »

II. LE PROCESSUS DE « LUSTRATION » DES JUGES MIS EN PLACE EN SERBIE PAR LA *LOI SUR LA RESPONSABILITÉ POUR LES VIOLATIONS DES DROITS DE LA PERSONNE*

Les derniers événements qui se sont déroulés en Serbie, plus particulièrement l'assassinat du Premier ministre Zoran Djindjic le 12 mars 2003, ont incité les autorités serbes à prendre de nouvelles initiatives, notamment dans le domaine judiciaire, pour assurer la transition vers la démocratie. Ces initiatives se traduisent entre autres par l'adoption d'une loi de « lustration » ou, pour reprendre les termes exacts, d'une *Loi sur la responsabilité pour les violations des droits de la personne*[66].

A. Les paramètres généraux de la loi

1. La notion de violation des droits de la personne selon la *Loi sur la responsabilité pour les violations des droits de la personne*

La loi de « lustration » serbe indique tout d'abord que la notion de droits de la personne réfère aux droits établis et protégés par le *Pacte international relatif aux droits civils et politiques*[67], signé et ratifié par la République fédérale socialiste de Yougoslavie, aux droits et libertés prévus par la *Constitution de la République fédérale socialiste de Yougoslavie* de 1974, par la *Constitution de la République fédérale de*

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65 Éric A. POSNER et Adrian VERMEULE, *op. cit.*, note 54, p. 34.

66 *Accountability for Human Rights Violations Act*, précitée, note 17.

67 Précité, note 43.

Yougoslavie de 1992 et par la *Constitution de la République de Serbie* de 1990[68].

La loi mentionne également son application rétroactive, couvrant toutes les violations des droits de la personne survenues après le 23 mars 1976, soit le jour de prise d'effet du *Pacte international relatif aux droits civils et politiques*[69].

Par la suite, la loi définit, dans son article 5, ce qu'est une violation des droits de la personne de façon très générale[70,] puis en prévoit, aux articles 6, 7 et 9, des formes plus spécifiques qui couvrent le droit à la vie privée[71],

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[68] *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17 :

> « ***Human Rights in Terms of this Law***
>
> **Article 3**
>
> Human rights for the purpose of this Law are the rights set out in the International Covenant on Civil and Political Rights, signed and ratified by the Socialist Federative Republic of Yugoslavia, rights and liberties of man and citizen as set out in the 1974 Constitution of the Socialist Federative Republic of Yugoslavia; The Constitution of the Federal Republic of Yugoslavia from 1992 and the Republic of Serbia Constitution from 1990. »

[69] *Id.*, art. 4.

[70] ***General Forms of Human Rights Violations***

> « **Article 5**
>
> Violation of human rights for the purpose of this Law is every action undertaken by a person specified in this Law in discharge of duty and/or task, which:
>
> represents a criminal offence or other punishable act which is prosecuted ex officio, which has fallen under the statute of limitations for criminal or other penal prosecution, in whose commission the person specified under this Law participated as a perpetrator, instigator, accomplice, abettor, organiser of criminal conspiracy or whose commission such person failed to prevent in accordance with his/her legal powers.
>
> has as its aim to deprive a person of his/her lawful rights or to hinder exercise of such rights, or to enable a person to acquire a right or benefit to which such person is not entitled under law; or
>
> has as its aim to influence a state body, organisation, enterprise or other legal entity to take a decision or undertake an act which brings citizen into an unequal position. »

[71] ***Special Forms of Human Rights Violations through Infringement of the Right to Privacy***

le droit à l'égalité[72] et le droit à des procédures judiciaires ou extra-judiciaires exemptes de toute motivation politique[73].

« **Article 6**

Violation of human rights for the purpose of this Law is any act of a person specified herein which infringes the right to privacy of another, undertaken with the aim to acquire information relevant to such person or in his/her possession in order to deliver such information to the Security Information Agency or the preceding and/or other corresponding service.

Violation of human rights occurs also when the act specified in paragraph 1 of this Article is committed on orders from a superior and also when such act was not in contravention of domestic regulations in force at the time of commitment but was in contravention of the provisions of the International Covenant on Civil and Political Rights. »

[72] ***Special Forms of Human Rights Violations through Infringement of Equality under Law***

« **Article 7**

Violations of human rights for the purpose of this Law is also every act undertaken by a person specified by this Law, which in court proceedings or a proceeding before other state body, or in a proceeding before an organisation exercising public authority, or during conclusion of legal business and other forms of legal transactions by a state body or organisation exercising public authority:

grants unwarranted privileges to a person in respect of another or other persons, by processing cases outside of the order of their submission, or by concluding legal transactions under privileged conditions, unless otherwise specified by law;

discriminates against a person in respect of another or others, in contravention of the principle of equality under law regardless of sex, age, race, colour, nationality, political views or other personal traits even when discrimination is not a criminal offence, or rendering of public service is refused in contravention of the principle of equality under law; or

fails to undertake measures it ensure equality of persons when so stipulated by law.

Violation of human rights also occurs when the act specified in paragraph 1 of this Article is committed on orders of a competent person or body, or a superior, and also when such an act was not in contravention of domestic regulations at the time of commitment but was in contravention of the provisions of the International Covenant on Civil and Political Rights. »

[73] ***Participation in Politically Motivated Judicial or Extra-Judicial Proceedings***

Article 9

Violation of human rights for the purpose of this Law occurs also when a person specified under this Law, acting in official capacity in court proceedings or a proceeding before a state body or organisation where another person is being

L'article 10 de la loi prévoit ensuite 21 catégories de fonctions pour lesquelles les personnes ne doivent jamais avoir commis de violation des droits de la personne telle que définie précédemment[74]. Cet article a une portée très vaste et englobe pratiquement tous les postes de la fonction publique, dont ceux reliés au pouvoir judiciaire, prévus dans la 12e catégorie de l'article 10 :

> « *Persons accountable for Human Rights Violations*
>
> **Article 10**
>
> 12. President and judge of the Constitutional Court of Serbia (hereinafter: Constitutional Court), president and judge of courts of general jurisdiction and special courts, member of the High Judicial Council, public prosecutors and their deputies, administrator of misdemeanor court and misdemeanor judges. »

Cette catégorie à elle seule est très large, couvrant les présidents et les juges de toutes les cours, les procureurs, les administrateurs de cours et les membres du Conseil de la magistrature serbe, de même que les candidats à ces postes.

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deprived of certain rights, or such rights are restricted, or an obligation is imposed to do or abstain from doing or to endure, or other punitive or other enforceable measure is pronounced against him/her, if such person was aware that the proceeding was being conducted for the sole purpose of applying political attitudes and criteria that are overtly or covertly represented as legal rules or criteria.

[74] L'article 8 de la loi prévoit toutefois trois cas d'exemption de responsabilité pour les violations des droits de la personne :

> « There shall be no culpability for human rights violations specified under Articles 6 and 7 of this Law if the act:
>
> was committed by a person under 18 years of age;
>
> was committed under duress, threat, blackmail or other prohibited pressure; or
>
> was committed through information supplied to the Security Information Agency or its predecessor and/or other corresponding service, in a statement during questioning by the police and/or during detention by the police, in prison or custody. »

2. Le processus de « lustration » tel qu'appliqué aux juges

La loi prévoit que tant les candidats qui postulent pour un poste de juge que ceux déjà en place doivent être soumis au processus de « lustration » et ce, selon des modalités différentes.

Il convient de mentionner les modalités du processus de « lustration » préalable, mais de façon très brève seulement puisqu'elle ne touche pas au principe d'inamovibilité, principe qui nous occupe ici en tant que garantie d'indépendance de la magistrature.

Essentiellement, ce qui distingue la « lustration » préalable de la « lustration » appliquée aux juges déjà en poste sont les organes chargés d'initier le processus et la sanction en cas de violation des droits de la personne, alors que le processus de « lustration » proprement dit est le même dans les deux cas.

Pour l'examen préalable à la nomination, le *High Judicial Council*, le *Council for Court Administration Issues* ou l'Assemblée nationale[75] doivent, sans délai et pour chaque candidat à un des postes énumérés dans l'article 10 de la loi, initier le processus de « lustration » en faisant une requête d'examen devant la Commission d'enquête sur la responsabilité pour les violations des droits de la personne[76].

Un candidat pour lequel l'enquête a révélé une violation des droits de la personne doit retirer sa candidature du poste convoité, après avoir utilisé les moyens de contestation de la décision de la Commission d'enquête, le cas échéant[77].

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[75] La loi prévoit, à l'article 14, que les autorités et organisations compétentes pour la nomination, la sélection ou l'embauche d'un candidat à un poste spécifié à l'article 10 doivent initier les procédures d'examen de responsabilité. Or, c'est l'Assemblée nationale, sur recommandation du *High Judicial Council*, qui procède à toutes les nominations aux cours de Serbie, en vertu de l'article 46 de la *Loi sur les juges*, précitée, note 14. Par ailleurs, depuis les amendements du 19 mars 2003, c'est désormais le *Council for Court Administration Issues* qui procède aux nominations des présidents de cour.

[76] *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17, art. 14(1) et (2).

[77] Pour la « lustration » préalable à la nomination au poste de juge, voir les articles 14 à 17 de la *Loi sur la responsabilité pour les violations des droits de la personne*, *id.*

Quant au processus de « lustration » applicable aux juges déjà en poste, il est initié d'office par la Commission d'enquête sur les violations des droits de la personne[78].

Une fois la requête d'examen faite, un panel de la Commission d'enquête doit procéder à l'enquête à l'intérieur d'un délai de 60 jours[79].

Un juge pour qui l'enquête a révélé une violation des droits de la personne a le droit, dans les sept jours de la réception de l'avis écrit de violation, de vérifier tous les documents et dossiers sur lesquels le panel de la Commission s'est basé pour conclure à la violation des droits de la personne[80].

Après avoir vérifié les dossiers et les documents en question, le juge doit, dans les sept jours de la vérification ou de l'expiration du délai de vérification, informer le panel de la Commission d'enquête de sa décision de démissionner de son poste ou de contester la décision du panel devant la Commission[81].

Si le juge décide de contester la décision du panel devant la Commission d'enquête, celle-ci doit décider de l'objection en session, dans les trois jours de son dépôt[82].

Enfin, dans l'éventualité où la Commission rejetterait l'objection du juge à la décision du panel, celui-ci peut, en dernier recours, porter plainte devant la Cour suprême de Serbie dans les sept jours suivant la réception de la décision de la Commission[83].

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78 *Id.*, art. 18.

79 *Id.*, art. 15(1). L'enquête consistera à vérifier les documents de la Security Information Agency ou du service qui l'a précédée, ou de tout autre service pertinent, les dossiers de cour et les dossiers gouvernementaux ou d'organisations ayant une autorité administrative (art. 15(2) de la loi).

80 *Id.*, art. 16(1).

81 *Id.*, art. 16(2).

82 *Id.*, art. 16(4). La Commission peut juger pertinent de tenir des auditions lorsque cela s'avère nécessaire pour recueillir certains témoignages (art. 11, 20, 29 et 30(2) 3°).

83 *Id.*, art. 16(5) et 29. Cette plainte ne doit toutefois porter que sur des faits nouveaux dont le juge faisant l'objet du processus de « lustration » n'a pu prendre connaissance qu'après la décision de la Commission sur l'objection à la conclusion du panel (art. 17).

Une fois le processus terminé et si la conclusion de violation des droits de la personne est maintenue, le juge doit démissionner de son poste, sans quoi la Commission d'enquête publiera des communiqués de presse dévoilant la participation de celui-ci aux violations des droits de la personne et son refus de démissionner du poste occupé[84].

Par la suite, la loi prévoit l'interdiction, pour toute personne trouvée responsable de violation des droits de la personne au terme du processus de « lustration », d'occuper un des postes énumérés à l'article 10 pour une période de cinq ans[85].

Il est important de mentionner que le processus de « lustration » serbe n'implique pas de procédures judiciaires. La Commission d'enquête doit simplement déterminer si les éléments préalables de responsabilité pour les violations des droits de la personne ont été rencontrés, conformément au Code criminel, au moment où les violations ont été commises[86].

Dans ce contexte, les règles applicables au processus de « lustration », notamment celles relatives à la représentation du juge faisant l'objet de l'enquête, au statut de celui-ci devant la Commission, à son droit à une défense et à la consultation d'un avocat sont celles du Code de procédure pénale serbe[87].

Jusqu'à présent, personne n'a fait l'objet du processus de « lustration » en Serbie[88].

B. Les garanties qui doivent être apportées au processus de « lustration » pour que celui-ci demeure conforme aux valeurs démocratiques

Dans toute société en transition, un des objectifs prioritaires est l'établissement d'une saine magistrature, apte à se prononcer de façon

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[84] *Id.*, art. 32. D'autres cas pour lesquels la Commission doit publier des informations concernant les auteurs de violations des droits de la personne sont également prévus par cette disposition.

[85] *Id.*, art. 33.

[86] *Id.*, art. 12(3).

[87] *Id.*, art. 11(2) et 22.

[88] Cette information nous provient de Vladan Miladinovic, Agent politique, économique et attaché de presse de l'ambassade du Canada pour l'État de Serbie et Monténégro.

indépendante et impartiale sur les violations des droits de la personne commises sous l'ancien régime, et capable d'assurer le respect des droits fondamentaux pour le futur.

L'indépendance judiciaire, assurée essentiellement par la garantie d'inamovibilité des juges, leur sécurité financière et leur indépendance administrative devient donc la voie vers une société libre et démocratique[89].

Le Comité des Ministres du Conseil de l'Europe a d'ailleurs rappelé, dans l'exposé des motifs de la *Recommandation sur l'indépendance, l'efficacité et le rôle des juges*, que l'indépendance des juges […] est un des piliers sur lesquels repose l'État de droit[90].

Dans le noyau dur de ce que constitue l'indépendance de la magistrature se retrouve le concept d'inamovibilité qui permet à un juge, une fois nommé, de pouvoir remplir sa fonction en toute sérénité selon, pour suivre l'expression d'usage, bonne conduite, ce qui signifie tant et aussi longtemps que l'organisme habilité à le faire n'aura pas recommandé au gouvernement, à la suite d'une enquête, que ce juge soit destitué[91].

Selon le Comité des Ministres du Conseil de l'Europe, qui a prévu la garantie d'inamovibilité dans la *Recommandation sur l'indépendance, l'efficacité et le rôle des juges*[92], le principe d'inamovibilité des juges

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89 À ce sujet, voir notamment M.L. FRIEDLAND, *op. cit.*, note 24.

90 *Exposé des motifs de la Recommandation Rec (1994) 12 sur l'indépendance, l'efficacité et le rôle des juges*, Conseil de l'Europe, Comité des ministres : http://cm.coe.int/stat/F/Public/1994/fExpRep(94)12.htm, par. 3, 15 et 38.

91 Au sujet de l'inamovibilité, voir notamment les arrêts suivants de la Cour suprême du Canada: *Valente* c. *La Reine*, précité, note 23; *R.* c. *Beauregard*, précité, note 23; *Mackeigan* c. *Hickman*, précité, note 23; *R.* c. *Lippé*, précité, note 23; *R.* c. *Généreux*, précité, note 23; *Ruffo* c. *Conseil de la magistrature*, précité, note 23; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île du Prince Édouard*, précité, note 23; *Therrien (Re)*, précité, note 23; *Moreau-Bérubé* c. *Nouveau-Brunswick (Conseil de la magistrature)*, précité, note 23; *Mackin* c. *Nouveau-Brunswick (Ministre des Finances)*, précité, note 23; *Rice* c. *Nouveau-Brunswick*, précité, note 23; *Ell* c. *Alberta*, précité, note 23.

92 *Recommandation (n^o R (94) 12) sur l'indépendance, l'efficacité et le rôle des juges,* adoptée par le Comité des ministres du Conseil de l'Europe, 13 octobre 1994, 518^e réunion des Délégués des Ministres :

« vise à garantir leur indépendance et a pour conséquence qu'un juge nommé de manière permanente ne peut être révoqué sans juste motif avant d'avoir atteint l'âge de la retraite obligatoire »[93].

Les juges serbes sont nommés à vie en vertu de la *Loi sur les juges*[94]. Par conséquent, ils ne peuvent être démis de leurs fonctions sans juste motif avant d'avoir atteint l'âge de la retraite.

Toutefois, les activités antérieures pouvant constituer un juste motif au sens de la *Charte européenne sur le statut des juges*[95] et de la *Recommandation sur l'indépendance, l'efficacité et le rôle des juges*[96], on peut affirmer que la *Loi sur la responsabilité pour les violations des droits de la personne*[97], en prévoyant la destitution immédiate des juges ayant été trouvés responsables de violations des droits de la personne, ajoute un juste motif de dérogation à la règle de l'inamovibilité des juges[98].

Principe I – Principes généraux concernant l'indépendance des juges

Les juges, qu'ils soient nommés ou élus, sont inamovibles tant qu'ils n'ont pas atteint l'âge obligatoire de la retraite ou la fin de leur mandat.

93 *Exposé des motifs de la Recommandation Rec (1994) 12 sur l'indépendance, l'efficacité et le rôle des juges*, *loc. cit.*, note 90.

94 *Loi sur les juges*, précitée, note 14, art. 2.

95 *Charte européenne sur le statut des juges*, Conseil de l'Europe, 8-10 juillet 1998 : http://www.cidadevirtual.pt/asjp/medel/novos/carte_europeene.html.

« **3. Nomination, inamovibilité**

Le statut détermine les situations dans lesquelles les activités antérieures d'un candidat ou d'une candidate ou celles exercées par leurs proches font obstacle, en raison des doutes qu'elles peuvent légitimement et objectivement susciter sur leur impartialité ou leur indépendance, à une affectation à un tribunal. »

96 Précitée, note 92 :

« Principe VI – Exercice défaillant de responsabilité et fautes disciplinaires

Les juges nommés à titre permanent ne peuvent être révoqués sans juste motif tant qu'ils n'ont pas atteint l'âge de la retraite obligatoire. Ces raisons, qui devraient être définies en termes précis par la loi, […] pourraient concerner les cas où le juge est incapable de s'acquitter de fonction judiciaire ou a commis des infractions pénales ou de graves violations des règles disciplinaires. »

97 Précitée, note 17.

98 Au Canada, l'arrêt *Therrien (Re)*, précité, note 23, confirme la possibilité de destituer un juge pour ses activités antérieures.

Malgré que la loi de « lustration » serbe semble a priori contraire à la règle de l'inamovibilité, toutes deux visent en fait le même objectif, soit la constitution d'un corps de juges indépendants et légitimes, qui bénéficieront de la confiance du public.

Certaines garanties devront cependant être apportées au processus de « lustration » afin de s'assurer que son usage n'engendre pas d'effet pervers, telle la création d'une magistrature dont les membres sont manipulés grâce à l'épée de Damoclès que peut constituer la *Loi sur la responsabilité pour les violations des droits de la personne*.

1. La destitution des juges par une autorité indépendante des pouvoirs exécutif et législatif

La création d'une instance totalement indépendante des pouvoirs législatif et exécutif, qui aura pour fonction de déterminer l'existence de motifs de cessation des fonctions judiciaires, à la suite d'une procédure d'enquête établie par la loi, constitue une des façons d'assurer l'indépendance institutionnelle des juges face aux différents organes de l'État et d'éviter ainsi leur corruption[99].

Le *Statut universel du juge*[100], de même que la *Charte européenne sur le statut des juges*[101] prévoient, à cet égard, que la gestion administrative

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[99] Au Canada, cette exigence a été reconnue notamment dans les arrêts *Therrien (re)*, précité, note 23 et *Moreau-Bérubé* c. *Nouveau-Brunswick (Conseil de la magistrature)*, précité, note 23.

[100] *Statut universel du juge*, approuvé à l'unanimité par le Conseil Central de l'Union Internationale des Magistrats lors de sa réunion à Taipei (Taiwan), le 17 novembre 1999 : http://www.iaj-uim.org/FRA/07.html:

> **« Art. 11**
>
> **Administration et principes en matière de discipline**
>
> La gestion administrative et disciplinaire des membres du pouvoir judiciaire est exercée dans des conditions permettant de préserver leur indépendance, et se fonde sur la mise en œuvre de critères objectifs et adaptés.
>
> Lorsque cela n'est pas déjà assuré par d'autres voies résultant d'une tradition éprouvée, l'administration judiciaire et l'action disciplinaire doivent relever d'un organe indépendant comportant une part substantielle et représentative de juges. »

[101] Précitée, note 95.

des membres du pouvoir judiciaire doit s'exercer dans des conditions préservant leur indépendance, c'est-à-dire par un organe indépendant et comportant une part substantielle de juges.

La loi de « lustration » serbe ne respecte pas cette exigence fondamentale d'indépendance de l'organe chargé de déterminer l'existence de motifs de cessation des fonctions judiciaires puisque l'exigence selon laquelle cet organe doit être composé d'une part substantielle de juges n'est pas respectée.

En effet, la *Loi sur la responsabilité pour les violations des droits de la personne* précise d'abord que la Commission d'enquête sur les violations des droits de la personne, organe chargé d'administrer tout le processus de « lustration », est un organe indépendant et autonome financé par la République de la Serbie[102].

Mais la loi prévoit ensuite que la Commission est composée de neuf membres, soit trois juges de la Cour suprême de Serbie, trois éminents experts légaux, un représentant du procureur de la Couronne et deux députés de l'Assemblée nationale de Serbie détenant un diplôme en droit, élus à partir de différentes listes électorales[103]. Seulement le tiers des membres de la Commission étant des juges, on ne peut parler d'une une part substantielle de juges.

Le Président de l'Assemblée nationale de Serbie doit d'abord dresser une liste de candidats pour chaque groupe de membres dont sera composée la Commission, puis les candidats sont élus démocratiquement par vote secret de l'Assemblée nationale. Un vote séparé est tenu pour chaque liste de candidats[104].

> « **Principes généraux**
>
> Pour toute décision affectant la sélection, le recrutement, la nomination, le déroulement de la carrière ou la cessation de fonctions d'un juge ou d'une juge, le statut prévoit l'intervention d'une instance indépendante du pouvoir exécutif et du pouvoir législatif au sein de laquelle siègent au moins pour moitié des juges élus par leurs pairs suivant des modalités garantissant la représentation la plus large de ceux-ci. »

[102] *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17, art. 22.

[103] *Id.*, art. 23(1).

[104] *Id.*, art. 23(2), (3) et (4).

Enfin, le candidat ayant reçu la majorité des votes des députés présents est élu membre de la Commission[105].

Dans un souci de légitimité, la loi prévoit qu'aucun membre de la Commission ne doit être membre d'un parti politique[106], ni avoir purgé une sentence non suspendue de plus de six mois ou une sentence pour toute infraction criminelle le rendant indigne de la confiance du public[107].

Le 17 juillet 2003, le Parlement de Serbie a élu huit membres de la Commission, mais a été incapable d'en nommer un neuvième puisque les partis de l'Opposition, qui devaient proposer le second député de l'Assemblée nationale, refusent de prendre part à la Commission d'enquête sur les violations des droits de la personne. Il est à noter que La Commission n'a d'ailleurs pas à ce jour commencé ses activités.

Cette situation aura-t-elle des répercussions sur l'indépendance de la Commission? Sur la confiance que le public entretiendra à son égard? Créera-t-elle des problèmes du fait que la Commission ne pourra prendre de décision à la majorité des voix? Seul l'avenir pourra nous le dire.

2. Le respect des règles fondamentales d'équité procédurale dans le processus de destitution

Le processus de « lustration », indépendamment du fait qu'il respecte la garantie d'indépendance de l'organe chargé de l'administrer, frappe de plein fouet le principe d'inamovibilité des juges, principe qui, dans les démocraties bien établies comme au Canada, est inviolable et non négociable.

Dans cette foulée, bien que l'inamovibilité des juges ne semble pas toujours un principe universellement reconnu, il est essentiel que dans le processus de destitution, les règles fondamentales d'équité procédurale soient respectées. C'est ce dernier point qui demeure, en bout de piste, non négociable.

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[105] *Id.*, art. 23(5). Un minimum de deux candidats doivent être nommés pour chaque poste disponible (art. 23(2) de la loi).

[106] À l'exception des députés.

[107] *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17, art. 27.

Le Comité des Ministres du Conseil de l'Europe recommande d'ailleurs qu'un juge faisant face à une procédure de destitution pour un motif autre que l'atteinte de l'âge de la retraite obligatoire bénéficie de toutes les garanties d'une procédure équitable, dont la possibilité de faire entendre ses arguments dans un délai raisonnable et d'avoir le droit de répondre à tout accusation portée contre lui[108].

En Serbie, la *Charte des droits de la personne, des minorités et des libertés fondamentales* prévoit que toute personne faisant face à des procédures criminelles a notamment le droit à une défense pleine et entière, le droit à l'avocat de son choix, le droit a un procès équitable et le droit d'en appeler de toute décision concernant ses droits[109].

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[108] *Recommandation (no R 94 (12) sur l'indépendance, l'efficacité et le rôle des juges*, précitée, note 92, principe VI, 3.

[109] *Charte des droits de la personne, des minorités et des libertés fondamentales*, partie intégrante de la *Constitution de l'État de Serbie et Monténégro*, précitée, note 2 :

> « Special guarantees
>
> Article 16
>
> […]
>
> Everyone has the right to a defence, including the right to take a defence counsel of his own choosing before the court or other authority competent for conducting the proceedings, to communicate without hindrances with his defence counsel and to have sufficient time and facilities for the preparation of his defence.
>
> […]
>
> No person that is accessible to the court or other authority competent for conducting the proceedings shall be punished unless he has be given the opportunity to be heard and to defend himself.
>
> No one shall be forced to testify against himself or to admit guilt.
>
> Right to a fair trial
>
> **Article 17**
>
> Everyone shall be guaranteed equal protection in proceedings before the courts, other state authorities and holders of public powers.
>
> Right to a legal remedy
>
> Article 18
>
> Everyone has the rights to a complaint or other legal remedy against the decision concerning his right, obligation or legally founded interest. »

À cet égard, la *Loi sur la responsabilité pour les violations des droits de la personne* respecte les règles d'équité procédurale en octroyant à toute personne faisant l'objet du processus de « lustration » les mêmes droits qu'une personne faisant face à des procédures criminelles, et en prévoyant que toute violation des droits procéduraux d'une telle personne représente une violation absolue de la procédure de « lustration »[110].

Enfin, le droit d'appel des décisions affectant les droits d'une personne, élément majeur de l'équité procédurale, est spécifiquement prévu par la *Loi sur la responsabilité pour les violations des droits de la personne*[111].

Ainsi, l'article 16 de la loi[112] accorde d'abord aux juges confrontés à la conclusion de violation des droits de la personne d'un des panels de la Commission le droit de s'objecter à cette conclusion devant la Commission elle-même.

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[110] *Loi sur la responsabilité pour les violations des droits de la personne*, précitée, note 17, art. 13(3) et (4).

[111] *Id.*, art. 29.

[112] *Id.* :

> « **Article 16**
>
> (1) A candidate for office specified in Article 10 hereof shall be entitled to, within seven days of acceptance of notice on violation of human rights, inspect all files and documents on basis of which the Commission Panel has determined that said candidate has violated human rights.
>
> (2) The person specified in paragraph 1 of this Article shall be entitled to, within seven days following inspection and/or expiry of the deadline for inspection, inform the Commission Panel of withdrawing his/her nomination or to file an objection with the Commission.
>
> (3) If the person specified in paragraph 1 of this Article withdraws his/her nomination, the commission immediately so informs the body and/or organisation competent for nomination, selection, appointment and taking into service of the person.
>
> (4) If the person specified in paragraph 1 of this Article files an objection with the Commission, the Commission in session decides on the objection within three days of receiving the objection.
>
> (5) The person submitting the objection may file a complaint with the Supreme Court of Serbia against the Commission's decision rejecting and/or refusing the objection, within seven days following delivery of the Commission's decision. »

Puis, dans l'éventualité où la conclusion du panel est maintenue par la Commission, le juge peut, en dernier recours, faire appel de cette décision devant la Cour suprême de Serbie[113].

C. Les conséquences possibles de l'application de la loi

Bien que la *Loi sur la responsabilité pour les violations des droits de la personne* poursuive des objectifs importants et nécessaires est-il possible que son application entraîne des effets dommageables?

1. L'application ciblée du processus de « lustration »

En Serbie, il existe trois catégories de juges. D'abord, il y a les juges qui ont été démis de leurs fonctions sous le règne de Slobodan Milosevic pour leur implication dans des programmes d'éducation de la magistrature, notamment en collaboration avec le Canada, ou pour avoir signé une pétition demandant aux gens de s'insurger contre l'ancien régime. Ensuite, il y a les juges qui ont participé activement aux violations des droits de la personne, tels les juges qui, à la suite de la non-élection de Slobodan Milosevic, ont recompté les votes et l'ont déclaré élu. Enfin, il y a les juges qui n'ont commis aucun acte contraire à la loi, mais qui sont demeurés passifs face aux violations des droits de la personne.

Dans ce contexte, la question qui se pose est : Convient-il d'appliquer le processus contre tous ceux qui ont participé aux violations, tant activement que passivement, ou convient-il plutôt de ne l'appliquer qu'à ceux qui ont commis les violations des droits de la personne les plus grossières?

Doit-on demander à tous les juges d'être des héros et de réagir aux violations des droits de la personne portées à leur connaissance? Doit-on exiger de tous les juges qu'ils aient un passé totalement irréprochable? Les juges qui sont demeurés passifs sous l'ancien régime doivent-ils être trouvés responsables de violations des droits de la personne? Les textes permettent-ils une telle conclusion? Si oui, est-ce là le vrai but de la loi?

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[113] *Id*. Seuls les faits inconnus du juge qui fait appel de la décision de la Commission, au moment où la Commission a rendu sa décision sur l'objection à la conclusion du panel, peuvent être mis en preuve devant la Cour suprême (art. 17 et 20(6)).

La loi de « lustration » serbe couvrant toutes les violations des droits de la personne commises depuis 1976 permet d'aller chercher pratiquement tous les juges en fonction et risque de décimer la magistrature serbe à une époque où la réparation des violations passées et la prévention de leur répétition passe par une magistrature saine et efficace, composée de suffisamment de personnel.

De là la nécessité d'un plan de « lustration » bien ciblé, permettant à la Commission d'enquête sur les violations des droits de la personne d'éliminer de la magistrature serbe la part de juges la plus critique, tout en faisant comprendre aux autres qu'aucune violation des droits de la personne ne sera tolérée de leur part.

Afin de prévenir une éventuelle pénurie de personnel qualifié et compétent pour assurer les fonctions judiciaires, il pourrait être également envisageable de renommer les juges ayant été démis de leurs fonctions sous l'ancien régime pour leurs valeurs démocratiques, ou de prolonger le mandat de ceux toujours en place pendant que les futurs juges acquièrent formation et expérience.

Ces juges, qui ont toujours eu à cœur le respect des droits fondamentaux, pourront effectivement apporter une précieuse collaboration à l'édification de l'État de droit en Serbie, d'autant plus qu'ils ont déjà l'expérience de la magistrature et sont en mesure de s'acquitter dès maintenant de leurs tâches judiciaires de façon efficace.

2. Les programmes d'éducation judiciaire, complément indispensable dans l'édification de toute magistrature indépendante

Il ne suffit toutefois pas de ne garder en poste que les juges n'ayant commis aucune violation des droits de la personne, encore faut-il que ceux-ci détiennent les connaissances et l'expérience juridiques nécessaires à leur fonction et ce, non seulement au moment de leur nomination, mais également tout au long de leur carrière. C'est pourquoi de nouveaux programmes d'éducation devront être mis en place en Serbie[114].

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[114] À ce sujet, voir notamment GOUVERNEMENT DE LA RÉPUBLIQUE DE SERBIE, *Project: Strategy for Judicial Reform in Serbia*, Judicial Reform Council, République de Serbie, Ministère de la Justice, Belgrade, octobre 2002.

La Commission des droits de l'homme des Nations Unis est d'ailleurs d'avis qu'une des façons de prévenir la répétition des violations est d'assurer, de façon continue, la formation dans le domaine des droits de la personne de tous les agents chargés de l'application de la loi[115].

Le Comité des Ministres du Conseil de l'Europe abonde dans le même sens en affirmant en outre que la formation contribue à l'indépendance judiciaire[116] :

> « La formation des juristes est un des éléments importants qui permettent d'assurer que les personnes les plus aptes soient nommées juges. Les juges professionnels doivent justifier d'une formation juridique appropriée. En outre, la formation contribue à l'indépendance du pouvoir judiciaire. En effet, si les juges possèdent les connaissances théoriques et pratiques suffisantes, ainsi que les compétences, ils pourront agir de manière plus indépendante face à l'administration […]. »

Selon le Conseil de l'Europe, cette formation doit être prise en charge par l'État, de façon à garantir aux juges « l'entretien et l'approfondissement des connaissances tant techniques que sociales et culturelles nécessaires à l'exercice de leurs fonctions »[117].

Alors que la formation initiale des juges devrait viser le développement des connaissances, habiletés et qualités nécessaires à l'exercice effectif des fonctions judiciaires, la formation continue devrait plutôt porter sur les nouveaux développements législatifs et jurisprudentiels, le tout dans l'objectif de former les juges à rendre une justice efficace et indépendante[118].

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[115] *(Projet de) Principes fondamentaux et directives concernant le droit à réparation des victimes des violations [flagrantes] des droits de l'homme et du droit international humanitaire*, précité, note 34, principe 15(h).

[116] *Exposé des motifs de la Recommandation Rec (1994) 12 sur l'indépendance, l'efficacité et le rôle des juges*, précité, note 90, par. 16(6º).

[117] *Charte européenne sur le statut des juges*, précitée, note 95, art. 4.4.

[118] Au sujet de la formation des juges, voir notamment GOUVERNEMENT DE LA RÉPUBLIQUE DE SERBIE, *op. cit.*, note 114 et M.L. FRIEDLAND, *op. cit.*, note 24.

Au Canada, la formation des juges est principalement assurée par l'Institut national de la magistrature[119], dont le mandat est de promouvoir un niveau élevé de rendement chez les juges grâce à des programmes qui favorisent leur croissance continue aux plans professionnel et personnel. Les programmes mis en place par l'Institut touchent trois grands domaines, soit le droit substantiel, le perfectionnement des habiletés et les questions sociales[120].

Enfin, dans un souci de préserver l'indépendance de la magistrature, la formation devrait être supervisée par des membres de la magistrature et être dispensée sur une base volontaire seulement.

CONCLUSION

L'histoire contemporaine nous enseigne que les sociétés civiles qui se construisent à l'aune de la démocratie doivent non seulement accorder des réparations de nature économique aux victimes de l'ancien régime, mais encore doivent-elles faire la paix avec le passé : commissions de vérité, poursuites pénales, nationales ou internationales des dirigeants et collaborateurs de l'ancien régime, « lustration » même, c'est-à-dire processus qui oblige ceux qui ont transgressé les droits de la personne à quitter leurs fonctions, voilà donc quelques-unes des approches retenues par les pays en transition. La rétroactivité des moyens utilisés heurte de plein front la norme constitutionnelle et internationale de légalité. C'est donc au nom d'une loi supérieurement hiérarchique, au nom aussi des principes fondamentaux des droits de la personne qui constituent une coutume internationale que ces actions peuvent être menées dans un État.

Mais comment concilier le principe premier de l'indépendance de la magistrature, soit celui de l'inamovibilité des juges, principe si cher aux yeux des juges canadiens et si bien articulé par la Cour suprême du Canada, d'ailleurs clairement reconnu par les instruments européens, avec la nécessité d'ainsi faire la paix avec le passé?

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[119] D'autres organismes sont également impliqués dans la formation judiciaire au Canada, notamment l'Institut canadien d'administration de la justice, le Western Judicial Educational Centre et le Conseil canadien de la magistrature.

[120] Voir le site Internet de l'Institut, à l'adresse suivante: http://www.nji.ca/Public/French/index.htm.

Si nous, juges canadiens, ne pouvons qu'applaudir l'attitude des juges Sud Africains, qui bien qu'appelés à le faire ont refusé de témoigner devant la Commission de vérité présidée par Desmond Tutu, à la fin des années 1990, force est de reconnaître que l'approche retenue par le gouvernement en Serbie est tout à fait différente, et que partant les juges n'auront pas la même marge de manœuvre.

Nous avons longuement élaboré sur le processus de « lustration » qui prend place en Serbie. Il est essentiel que la Commission d'enquête soit un organe indépendant et autonome du gouvernement. Il faut aussi que, dans la réalité, les membres nommés soient effectivement indépendants. Il est essentiel de plus que les règles d'équité procédurale soient respectées, afin que ne soient ciblés que les juges qui ont commis des grossières violations des droits de la personne. Le processus de « lustration » doit se faire dans la transparence et doit être circonscrit dans le temps.

En remontant jusqu'en 1976, la loi de « lustration » serbe fouille très loin dans le passé des juges. La plus grande rigueur sera donc de mise afin d'éviter que cette loi, dont le but ultime est de faciliter la transition vers la démocratie, ne devienne plutôt une loi dangereuse susceptible d'engendrer d'autres violations des droits fondamentaux.

C'est un défi de taille auxquels nos collègues serbes font face : leur intelligence, leur énergie, et leur lucidité sont pour nous source d'inspiration.

L'indépendance de la magistrature fonde la société civile. Si elle est difficile à atteindre, elle est aussi fragile et précieuse. C'est là une leçon que nous donnent nos collègues serbes dans le dialogue constant que nous avons avec eux. Les juges canadiens et les juges serbes parlent la même langue, celle de l'État de droit.

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Problems for a Judge in a Country in Transition

Radmila Dragicevic DICIC*

I live in Serbia and Montenegro, a country that was a part of ex-Yugoslavia. It is in South East Europe on the Adriatic Sea. From one country Yugoslavia became smaller countries: Croatia, Macedonia, Slovenia, Bosnian Federation and Serbia and Montenegro Union. Part of Serbia is the province of Kosovo, which is now under international protection.

In the last 12 years we have been witnesses to great historical and political changes: we have passed through civil war, the regime of Slobodan Milosevic, sanctions of the international community, NATO bombing, war crimes, political murders, growing poverty, refugees and the significant absence of the rule of law. Throughout this period the judiciary suffered a great deal, for the division of powers among the executive, the legislative and the judicial branches was destroyed. It was a very hard period from which all our society is recovering and trying to find the best way for progress.

In order to understand the situation today, it is important to learn something about the position of the judiciary under the regime of Slobodan Milosevic. The basic problem of the judiciary in Serbia has been the lack of independence. All attempts to have an independent judiciary were suppressed. During the past ten years, the judiciary acted as a dispatcher of the will of the political centres. The executive branch imposed extensive control over the judiciary. The executive, through the presidents of the court, ensured that the judges who were "obedient" to the regime received significant cases and therefore the judges who remained

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independent did not have the opportunity to exercise their independence with important cases. Any serious legislative reform was systematically blocked, especially the ones that would guarantee the true independence of the judiciary.

Some judges took a different path to oppose the regime. The Milosevic regime had enacted laws to prevent freedom of the press and had used the courts to "win" the local elections which had actually been won in the large cities by the opposition. This manipulation of the electoral system through the judicial system brought thousands of people to the streets in nightly demonstrations that lasted for four months over 1996-1997. Among the marchers were judges. As a result, the Government recognized the opposition victory in the local elections. The presence of the judges meant a great deal to the marchers, including the students, and it was clear that we judges were marching not to be involved in politics, but to fight for the rule of law.

While the Constitution[1] proclaims independence of the judiciary, in reality the authorities have expressed great resistance toward the rule of law, the separation of powers, and respect for the fundamental human rights and freedoms. Politically significant cases, or those in which the interests of individuals from the governing parties were involved, were assigned to already chosen suitable judges. It was enough for every court to have one or two suitable judges, for the other judges in court never to have an opportunity to prove their independence and impartiality. Frequently, suitable judges were temporarily transferred to other courts, even to other towns, where they would deliver "correct" decisions under the instruction of the executive. Furthermore, the executive would obstruct or constrain the enforcement of legitimate decisions delivered by a court.

Issues of financial autonomy and personal safety of judges depended also upon the will of the executive. They have never been resolved in a way to protect the independence of judiciary and its dignity. Not only did judges not receive salaries according to their position, but those salaries could not satisfy the basic minimum of existence at a subsistence level. This led to the inclination of corruption in the judiciary. The ruling parties were involved in most cases of corruption.[2] They granted apartments,

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1 *Constitution of the Republic of Serbia*, the Official Gazette of the Republic of Serbia, No. 1/90

2 Ruling parties are the Socialist Party of Serbia (SRS), United Left (JUL) and Radical Party of Serbia (SRS).

loans, and promotions to obedient and suitable judges. The material status and other problems in the judiciary have contributed to more than 1000 experienced judges (1/3 of their total number in Serbia and 2/3 of judges from military courts) leaving the judiciary. Instead of experienced and qualified judges, young and inexperienced recruits came. The vast majority of them were elected on political grounds, as they were members of one of the ruling parties.

Political suitability was of great importance in the procedure of electing judges. The presidency of the courts has consisted of members or high officials of the ruling parties. Elections and dismissal of the judges are governed by the *Courts Act*[3]; however, the implementation of this act in reality was distorted. The election and dismissal of judges has taken place in the National Assembly. The majority in the Assembly, as the ruling party, have decided on the election and dismissal of judges, making this act truly political. The Ministry of Justice played a significant role in the preparation of proposals by giving its opinion.

Through this very bad period, the Association of Judges of Serbia played a significant role. The history of the Association of Judges is the history of the beginning of the serious fight for the judiciary. The Association of Judges of Serbia is a voluntary professional non-partisan and non-political association, established in 1997 by a group of judges from Serbia interested in the improvement of the judicial system and the independence of the courts. The grave violations of basic constitutional principles and the independence of the courts by the regime after the local elections in Serbia in November 1996 led to the establishment of the Association. Certain judges and court chambers, having succumbed to political pressure, had violated basic constitutional principles. Thus they failed in their role in the protection of rights and freedoms of citizens, causing the general deterioration of trust in courts, law and justice.

The main purpose of the Association is to promote the rule of law and an independent and impartial judiciary. It hopes thereby to improve the separation of powers, the judiciary's role in protecting freedoms and rights of citizens, and the organization of the judiciary. Its members also aim at returning dignity to their profession. From a total of 2,500 judges, 590 judges from the Constitutional Court of Serbia, Supreme Court of Serbia,

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[3] *The Courts Act*, the Official Gazette of the Republic of Serbia, No. 46/91, 60/91, 18/92, 71/92.

High Commercial Court of Serbia, and the district, commercial and municipal courts were the first members of the Association.

Since its inception, because of the circumstances under which it was established, the Association has confronted various forms of opposition, primarily by the authorities. The Association has criticized the laws violating the Constitution and basic human rights, and has therefore been subjected to increased pressure by the authorities. Members of the Association have been harassed, and their persecution has been announced by certain members of the Serbian Government, by the Minister of Justice, the President of the Supreme Court, and presidents of district and municipal courts. The regime attempted to deter any public criticism addressed by the Association and caused by violations of the independence of the judiciary, the rule of law, equality of citizens and human rights. Repeatedly, the ruling parties have publicly attacked the Association and accused its prominent members of being "traitors and foreign hirelings". The authorities also threatened that the judiciary "would be put in order", and judges re-elected, although the office of the judge is for life. Presidents of courts directly threatened the Association members, who were harassed in various forms, including sudden transfers and withdrawals from cases.

A decision of the Supreme Court of Serbia on February 17, 1999 prohibited in effect the work of the Association. This decision violated the freedom of association, which is guaranteed to judges by the *International Covenant on Civil and Political Rights*, ratified by Yugoslavia; by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; and by point 9 of the Basic Principles on the Independence of the Judiciary, from the *Universal Declaration on the Independence of the Judiciary*.

On December 21, 1999, the National Assembly of Serbia dismissed three prominent members of the Association of Judges: one judge of the Constitutional Court of Serbia, one judge of the Supreme Court, and one judge of the Fifth Municipal Court in Belgrade. It was done without any legal procedure and in violation of the Constitution and laws. One of the dismissed judges was the President of the Association of Judges of Serbia, while the other two were members of its Governing Board. The dismissed judges were blamed for being politically active because they publicly criticized violations of the independence of judiciary, the rule of law and human rights. Furthermore, membership in the Association of Judges and its Governing Board was considered as political activity, and therefore a

violation of the constitutional provision[4] that proscribes political activities of judges that are incompatible with their position.

In July 2000, twenty judges were dismissed in the same manner (among them, one from the Supreme Court of Serbia, one from the High Commercial Court and seven from the circuit courts); all remaining judges who were members of the Governing Board of the Association of Judges were among them. The direct motive for dismissal was an open letter which discussed the situation in the judiciary and the influence that the executive had over the judiciary. Hence, the principle of irremovability of judges was disregarded and the Association of Judges of Serbia was practically unable to operate.

The members of the Association of Judges of Serbia believed, and still believe, that it is their duty to take part in the process of the democratic transition of the country, and to promote the independence of the judiciary in order to protect the rights and freedoms of citizens. Their activities have been professional and apolitical, aimed at pointing out the increasing influence of the organs of the executive on the election and removal of judges, an influence that essentially jeopardises the democratisation of society and the functioning of legislative powers. By fighting for an independent judiciary, the rule of law and respect for human rights the dismissed judges sacrificed their safety and financial existence, and showed true dedication to their honourable profession. On the other hand, the former regime in Serbia did everything to threaten the independence and dignity of the judiciary.

The recent events after the fall of the regime of Slobodan Milosevic have completely changed the political scene, bringing democratically oriented parties and social groups to power. In that context, judges hope that the new ruling political parties will change the attitude toward the judiciary and will understand the essential need for the separation of powers. The transitional period effectively started two and a half years ago and the main focus is identified as the transformation of the judiciary. Many new laws have been enacted and many are awaiting enactment. It is big and complicated work, and influences all segments of life. For the judiciary the most important laws were ones concerning the organization of courts, the *Law on Judges* and especially the provisions of the *Law of High Judicial Council*, the new body in charge of proposing the election and dismissal of judges.

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4 *Constitution of the Republic of Serbia*, *supra* note 1, arts. 100, 126(4).

In the transitional reform process, the role of judges is extremely important, in order to achieve and maintain a democratic system, and the judges must be better prepared to cope with this difficult task. But in the case of Eastern countries, the judges are not sufficiently prepared to carry out their duties for they are "victims" of the institutional weaknesses within which they work, or they are anchored to stereotypes of justice which came from a concept belonging to a State organisational system that does not exist any more.

The basic democratic principles have been formally adopted, but there are still many difficulties in their application. The judges must learn how to best use the instruments at their disposal to defend their right of independence from the other national institutions. A few months ago Serbia and Montenegro became a member of the Council of Europe, and before that the *Declaration of Union and Declaration on Human and Ethnic Rights* with the new provisions that are in accord with international law, and human rights were enacted.

The big ongoing process is the continual education of judges, which is helped considerably by the international community, and also by the Canadian Section of the International Commission of Jurists, with a special project to support the independence of judges in Serbia and Montenegro. One year ago, the Association of Judges together with the Ministry of Justice founded the first Judicial Training Centre which established a new program for the education of judges.

Many things are to be done in Court organization and management, and computerization of courts, but still the main focus is on increasing judges' awareness. Through many international meetings and travelling, we try to provide some international experience and a comparative way of thinking for our judges. The long isolation of our country caused great damage. Judges in Serbia are usually well educated but they lack knowledge of international law. The Association of Judges is still very active and has initiated many projects with domestic and international organisations. In today's world there is a great need to develop international relations that are not limited only to economic exchanges, but that also involve a wide range of institutional activities among which are jurisdictional ones.

Organised crime, which we are fighting now, relies on a wide range of illegal activities which are developed, or elaborated, in a plurality of countries. The judiciary is faced now with many cases involving high organized crime. These judges have been trained by EU experts, and the cases that are going to trial soon will be a great task for the Serbian judiciary.

In Serbia now we have about 2,600 judges, for about 7 million inhabitants. There are 750 prosecutors. Under the new law we have 4 appeal courts and one Supreme Court, 30 district courts and 138 municipal courts, which are of general jurisdiction, and 16 commercial courts, 1 high commercial court, and the new Administrative Court. There is also the Constitutional Court of Serbia, which has started to play an important role in our judiciary.

The reform of the judiciary is still a live process, and there is still a long way to go. Judges must be aware of the power they have, the power of law and justice, and they must not be afraid to use it.

Corporate Social Responsibility in the Global Economy: Canadian Domestic Law and Legal Processes as a Vehicle for Creating and Enforcing International Norms

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I. THE PLACE OF THE CORPORATION IN INTERNATIONAL LAW, PRIVATE CITIZEN OR PUBLIC ENTITY?

For corporate law scholars, both doctrinal and theoretical research are taken from the starting point of the corporation as a separate legal personality, with perpetual existence, the ability to contract, an entity aimed solely at the generation of wealth through its economic activities. While viewed as largely engaged in private activity, the corporation, whether closely or widely held, private or an issuing corporation, is the beneficiary of a highly codified regime that enables it to operate in Canada. Similar enabling legislation in many jurisdictions allows corporations to operate internationally. Some of the debate in corporate law concerns the proper role of the law and the administration of justice with respect to the corporation and in particular, whether or not it is to be treated more as a private actor or as a legal construct granted certain rights and privileges in return for the socially desirable effects from its activities. There are also concerns about the special status granted to the persons who participate in its activity through the corporate form with respect to whether or not their privileges are being used in our society's best interests. One question that arises is whether our legal regime is giving these corporate actors the right messages about socially desirable behaviour.

The debates concerning these issues and the role of law and the administration of justice in providing the right messages are sufficiently complex when one is dealing with the role of domestic law in corporate social responsibility. However, once one must consider the issues in the context of a multinational enterprise (MNE) and the role of international law in providing appropriate incentives for socially responsible behaviour, the complexity expands. In addition, the change in the type of law from domestic law—which is primarily concerned with the regulation of a nation's citizens—to international law—which concerns relations between sovereign nations, not the regulation of those nations' citizens, including

its corporate citizens, requires a change in the way we think about the role of law and the administration of justice in the regulation of MNE activity. These changes are some of the reasons why a key question is the efficacy and limits of the rule of law in respect of the global activities of MNEs.

II. CROSSING BORDERS: DOES THE MNE LEAVE THE RULE OF LAW BEHIND?

This article will first discuss the corporate form and the domestic legal regime that supports its existence. Two of the more crucial aspects of that regime are the separation of ownership and control, and the limitation of individual liability for corporate actors when corporate activity causes harms. The issue of corporate social responsibility must be assessed in the context of the domestic regime. This part then briefly reviews three conceptions of the proper role of the corporation in respect of social responsibility. They range from those that consider the only legitimate social goal to be the maximization of shareholder wealth to those that consider a corporation has a public duty to act in a socially responsible fashion. One cannot participate in this discussion without also discussing the normative features of various interpretations of the appropriate role of law in corporate regulation, including those norms that reside in the most neutral and enabling language.

Following this review, Part III then describes how the issues with respect to the corporate form are magnified when that corporation begins to operate in a multinational fashion. In a purely domestic system, the problem of limited liability for the corporation's agents is a problem of proper incentives for individuals in their management of the corporation. The vulnerability of the corporation's assets still serves as a constraint on decision-making by corporate managers, even under the strictest shareholder wealth maximization conception. If directors and officers subject the corporation's assets to legal liability through reckless or negligent acts, they may face personal liability for breach of their fiduciary duty. However, corporate affairs in a multinational operation can be arranged so that this risk is greatly reduced. The combination of the limited liability of the corporate form, and the general understanding of international law as inapplicable to an MNE's operations dramatically reduce the constraints on their managers in regard to respecting the environment, human, political or social rights in their operations outside the "home" country. The combination of these factors leads to at least four problems in this area: the problem of unlimited subsidiaries; the problem

of the reluctant host; the "Who, Me?" problem; and the problem of the race to the bottom of the market.

Finally, Part IV discusses the challenges for the administration of justice in the context of a global economy. Three issues appear to be relevant to this inquiry. Where can the voice of Corporate Social Responsibility for MNEs be heard in International Law? How can it be heard? Is there any remedial avenue available that can create appropriate incentives for the MNE's management to adhere to some form of corporate social responsibility in their conduct of the MNE's operations?

While there are not yet any final answers to these questions, one possible solution is enacting legislation that grants extra-territorial jurisdiction and creates enforceable remedies for harms caused by domestically registered corporations in their activities internationally. This could involve expanding the notion of corporate law fiduciary duty to encompass international law norms in respect of the environment, human, social and political rights. Any intentional or negligent breach of these norms would subject the MNE manager involved to sanctions similar to those imposed for breaches of fiduciary duty in a domestic setting. The missing element in the multinational context is the threat to corporate assets from legal liability that gives force to the claim the director breached the duty to act in the best interests of the corporation in a domestic context. The question is whether it can be replaced by a combination of consumer markets, markets for socially responsible investment and incentives from home countries to MNE's to report on social responsibility factors, and to host countries to enter international accords that have a social responsibility element. The administration of justice is implicated in this potential regime as the forum in which failures to abide by international norms can be identified, and breaches of fiduciary duty declared and remedied.

A. The Corporate Form and the Domestic Legal Regime

The Canadian domestic legal regime delimits the rights and responsibilities of the corporation's agents, offers some remedial protection and default control rights to its investors, and generally facilitates capitalization transactions of the corporation. In terms of shareholder investment and managerial control, some key features are that the statutes assign directors oversight and control of the operations of the corporation. Shareholders can exercise episodic voice in corporate affairs, but only indirectly, through the election of directors, advisory shareholder

resolutions, voting on management's resolutions and super-majority votes on changes to capital structure that affect the existing shareholders. In terms of the limited liability regime, a key feature is that shareholder liability is limited to the shareholder's total investment. Managers control the corporation's activity, but they have no general personal liability for harms caused by its activity. There are some exceptions, such as statutory liability for wages, domestic environmental damage and some torts, as well as liability under oppression remedy and derivative suits.

Hence the study of corporate law has been a study of the scope and limit of the corporation's activities, its efficiency in facilitating the generation of wealth, its capital and governance structure, its relationships with investors and other stakeholders, and consideration of the *ex ante* incentive effects created by particular policy choices in corporate and securities law. Unlike other jurisdictions, in Canada, there is remarkably little scholarship regarding corporate social responsibility.

B. Corporate Social Responsibility in the Domestic Context

As a result, there is considerable disconnect between Canadian corporate law scholarship and the scholarship that engages issues of the corporation's role in a global society, including issues of international human rights protection and global sustainability. This disconnect is more significant than merely difference in scholarship focus. It concerns fundamental normative disagreements about the role of law and legal processes in corporate activity and markets generally, and disagreement regarding the economic and social objectives of corporate activity. A brief review of the various competing conceptions will be helpful in setting the context.

1. The Neutral Market and the Political Regulation of Social Responsibility

Much corporate law scholarship is premised on the view that it is not grounded in any particular normative view of the corporation, but rather, involves observations about the effects of legislative intervention on the functioning of perfect markets, corrected for any outliers. Scholarship is also based on a notion of investors as rational actors, who are not socially situated individuals, with wealth maximization as their sole objective. Hence corporate law scholarship explores the law's role as enabling and efficiency enhancing. While this approach is clearly one that has made

normative choices regarding the role of the corporation and its investors, with all the attendant distributive effects, the scholarship rarely acknowledges that these are normative choices.

The result is that there is a separation in the discourse, in terms of both the laws that regulate corporate conduct and the judicial forum in which these issues are determined. Domestic human rights, labour law, community control of land and resource use issues are generally matters determined through the administrative law system. While administrative agencies and tribunals bring considerable expertise to their determination of these issues, the scope of the inquiry and the remedies ordered are subject to the limits of the statutory regime from which they derive their authority. Thus while standards have been set, the remedies are frequently aimed at addressing a particular individual harm, and only in a few instances are comprehensive remedies considered. The law's role in this respect is also to create incentives to restrain particular conduct. Statutory standards are coupled with the threat of sanction for violation of the standards and remedies for specific harms such as toxic spills, failure to pay minimum wages or provide healthy and safe working conditions and a host of other standards that reflect domestic public policy. While deterrence is frequently an objective of domestic remedial legislation, rarely does the law impose systemic preventive programs on corporate entities. Moreover, the remedial legislation is aimed at domestic harms and remedies, although in some cases, tribunals and courts draw their analysis of the scope of the rights protected from international norms and treaties.

In the domestic context, high deference to business judgments by the courts helps to foster economic activity and enhance the ability of corporations to compete in global capital and products markets. Public policy aimed at these objectives is evident in both the enabling structure of corporations statutes and the express aims of securities laws.[1] However, such deference can also facilitate *ex post* effects in terms of externalization of social and economic harms. The broadly accepted Anglo-American normative conception of the corporation is that shareholder wealth maximization is the sole objective of corporate activity and the measure against which directors and officers will be adjudged as to whether they

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[1] See for example, the purpose clause of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1.

are acting "in the corporation's best interests".[2] Thus, aside from compliance with minimum standards set by environmental, social welfare, human rights and labour legislation, corporate conduct that results in harms to individuals and communities is considered within the range of "acceptable" corporate decision making. Moreover, some contractarian theorists have suggested that the corporation need not be engaged in socially responsible activity, because as a legal fiction, corporations are incapable of acting "morally". Hence not only should the corporation's activities be solely governed by its contractual relations, but if parties are unable to bargain protections, the corporation can engage in whatever activity it chooses.[3] The "social" value that corporations are to contribute is that in generating wealth for shareholders, the aggregate social welfare will increase.[4] While legal scholars acknowledge that corporate activity affects the interests of other stakeholders, they suggest that these interests should be protected either by contractual bargains, enforcement of implicit contracts or public laws that expressly limit the activities of corporations. Yet this approach ignores the problem of information asymmetries, lack of bargaining power and inability to enforce either explicit or implicit contracts.

While there is merit in the suggestion that remedial legislation be used as the policy instrument for advancing social equality and social justice, this ignores the persuasive economic and normative power that corporations can exercise over the political process and hence the development or retention of public laws that may protect corporate stakeholders from particular harms. Elsewhere, I have suggested that the normative underpinnings for this conception of the corporation, both residual rights theory and the nexus of contractual relations approach to corporate law,

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2 The principal argument for this is that shareholders are the residual claimants to the value of the corporation's assets, and hence, corporate decisions should be made in their interests.

3 F. Easterbrook & D.R. Fischel, *The Economic Structure of the Law* (Cambridge: Harvard University Press, 1991); M.C. Jensen & W.H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305; J. Macey & G. Miller, "Corporate Stakeholders: A Contractual Perspective" (1993) 43 U.T.L.J. 401.

4 H. Hansmann & R. Kraakman, "The End of History for Corporate Law" (2001) 89 Geo. L.J. 439.

ignore the economic and social interests in the corporation that run along a continuum.[5]

2. Three Conceptions of the Corporation and Social Responsibility

In the United States, the debate regarding corporate social responsibility has been protracted, with corporate law scholars positioning themselves at extreme ends of a debate regarding the normative role of the corporation. The genesis of the debate commenced in the 1930s in a debate conducted regarding for whom are corporate managers trustees.[6] The debate centred on whether corporations were purely private entities, or whether they were to be considered quasi-public, and thus whether managers have public as well as private obligations in their governance of the corporation. Anglo-American scholarship has primarily, although not exclusively, concluded that the sole objective of the corporation is to generate value, and that it is inappropriate for corporations to engage in any activities that can be broadly classified as socially responsible, as it detracts from its primary profit-making objectives. Scholars have suggested that while profit making solely for the benefit of shareholders should be undertaken within the confines of the law, that is the sole social obligation of corporate decision makers.[7] This view arises from a normative conception of the corporation as engaging in purely private activity. The market mechanism is viewed as the only appropriate means of determining the allocation of scarce resources to alternative uses.[8] It

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[5] J. Sarra, "Corporate Governance Reform, Recognition of Workers' Equitable Investments in the Firm" (1999) 32 Canadian Business Law Journal 384.

[6] A.A. Berle, "For Whom are Corporate Managers Trustees: A Note" (1932) 45 Harvard Law Review 1365; E.M. Dodd Jr., "For Whom are Corporate Managers Trustees" (1932) 45 Harvard Law Review 1145.

[7] See for example, M. Friedman, "The Social Responsibility of Business is to Increase Its Profits" *New York Times Magazine* (13 September 1970) 122 at 122 [hereinafter "The Social Responsibility of Business"]. Friedman suggests that the whole justification for shareholders electing corporate directors is that the executive is an agent serving the interests of his or her principals, the shareholders. See also M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), where he suggests that social responsibility is fundamentally a subversive doctrine in a free society, and that the one and only social responsibility of business is to use resources to increase profits, as long as it engages in open and free competition without deception or fraud.

[8] Friedman argues that if corporate officers were to expand resources for social purposes, they would become civil servants while remaining employees of a private

also arises from the notion that corporations cannot serve as moral or social entities because their fundamental nature is a nexus of contractual relations with individuals entering multiple contracts, both implicit and express contracts, in their self-interests, and that corporations as inanimate objects are incapable of having moral or social obligations.[9]

This conception of the corporation fails to situate the corporation socially. Corporate activity is implicated in all aspects of economic, social and political activity. As citizens, we are exposed to corporate activity in every aspect of our lives. Health care is influenced by the choices made by corporations about research and development and the costs of services and equipment designed by corporations for health care providers. Accessibility to food and consumer goods is influenced by the pricing and import decisions of corporations. Most people in North America are either directly employed by corporations or by the spin-off businesses that support corporate activity. The safety of products such as cars, cleaning materials, construction materials, food and medication are all outputs of corporate decisions about risk and reward in their production decisions. Decisions to engage in production activity that is harmful to the local environment or to the health of the corporation's workers are frequently decisions assessing the cost and benefits of production, the risk of sanction by the state for non-compliant activities and the risk that any sanction will be upheld and enforced by the courts. Moreover, the current system allows corporations to externalize many of the costs of these decisions, thus redistributing the risk and costs of any harms on those employees, consumers or residents who engage with the corporation in all aspects of their daily lives. Hence while the generation and dissemination of profit may be a private activity, corporate conduct has a direct impact on a wide range of daily social activities by citizens and by communities. While there are legitimate issues of finite resources and questions of allocation, to leave those decisions solely to corporations ignores the distributive effects of those decisions. Quite aside from the questionable ability of the market to operate efficiently such that it can send the appropriate signals

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enterprise, and that the doctrine of social responsibility involves acceptance of the socialist view that political, not market, mechanisms are the appropriate means of determining the allocation of scarce resources to alternative uses: "The Social Responsibility of Business" *ibid.* at 123.

9 D. Fischel, "The Corporate Governance Movement" (1982) 35 Vand. L. Rev. 1259 at 1273-1274.

regarding allocation of resources, the way in which harms are not costed within the corporation skews any information on what precisely is the optimal allocation of those resources. The public policy regime that enables corporations to operate needs to take better account of the corporation as socially situated.

Daniel Ostas has observed that leaving compliance for corporate conduct to public regulators encourages corporate officers to disregard the effect of behaviour that would engage their concern if they were acting purely as individuals.[10] He uses the example of a pharmaceutical company where the sole medical doctor on the research team refused to endorse a new drug that she believed was unsafe, citing ethical obligations under her professional code of ethics.[11] The company removed her from the research team and she claimed wrongful discharge. The Supreme Court of New Jersey, in endorsing the corporation's actions, defined corporate social responsibility solely as the duty to follow the law; it held that it is for public authorities, in this case the FDA, to provide the independent check on the corporation's activities.[12] Ostas observes that law's indeterminacy means that managerial discretion becomes unavoidable and that the courts increasingly defer to managerial judgment. Hence positive legal formalism provides an impractical guide to corporate social responsibility.[13] Managers both follow but also shape legal rules in respect of acceptable norms of corporate conduct, in their risk assessment, their litigation strategies and their capture of political processes that would seek to regulate or limit their activities.[14] Ostas suggests that these factors should lead to more ambitious thinking about corporate social responsibility in that corporate officers could work with governments to focus on long-term profitability achieved through improvement in the law in respect to such conduct, rather than on short-term gains promised by circumventing it. He also suggests that corporate managers need a vision of the law that guides

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[10] D. Ostas, "Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory" (2001) 38 Am. Bus. Law Journal 261.

[11] *Ibid.* at 266-267, discussing *Pierce* v. *Ortho Pharmaceuticals Corp.* 417 A.2d 505 (N.J. 1980).

[12] The trial court found for the corporation, the appellate court reversed and the Supreme Court of New Jersey reinstated the trial judgment. Ostas, *ibid.* at 266.

[13] *Ibid*.

[14] *Ibid.* at 269-270, citing the work of free market economists with respect to the capture theory of regulation.

their exercise of discretion where socially responsible behaviour is not clearly specified at law.

The dominance of the current normative approach to corporate behaviour is giving way to a more nuanced and socially situated view of corporate activity. Yet even with this shift, the shareholder wealth maximization model continues to dominate choice of policy objectives and instruments in Anglo-American scholarship.

i. Synergies between Social Responsibility and Shareholder Wealth Maximization

There are three main streams of thought in the corporate law literature that depart from the dominant model. First, there may be synergies in creating long-term shareholder wealth maximization and engaging in socially responsible behaviour as the latter may produce value for shareholders in the long term from reduced liabilities, better consumer goodwill and fewer environmental remediation costs. This is a valid observation and one that has facilitated the development of socially responsible investment (SRI) funds, such as ISIS, primarily operating out of the U.K. and continental Europe.[15] These funds utilize particular social and economic benchmarks as signs of effective governance. They have policy analysts sitting on the trading floor with the financial experts, making decisions on ethical investments against criteria of environmental compliance, compliance with labour, employment and human rights standards and local securities law, as measures of effective stewardship of corporations and hence long term value maximization potential. In the US alone, it is estimated that SRI funds hold $2 trillion in assets.[16] Those advocating SRI and its ethical screening view SRI as the primary vehicle through which to achieve corporate social responsibility, by ultimately positively influencing stock prices. The premise is that shareholders will simultaneously profit and through their investments promote social objectives, the notion of doing well financially by "doing social good". In

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[15] ISIS Asset Management, http://www.isisam.com.

[16] Report on Socially Responsible Investing, http://www.socialinvest.org/areas/research/trends/2001-trends.htm. Cynthia Williams reports that by 1999, 9% of all assets under management in the US were in screened funds. C. Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 112 Harvard Law Review 1197.

Canada, such funds are at a nascent stage, although some of the labour sponsored investment funds engage in similar social and environmental auditing prior to investing. These are important developments, because they link effective stewardship of the corporation with norms such as long-term sustainability and human rights that arguably can be broadly supported as norms that we as a society want to support. It also indicates that there is a market for SRI funds, in terms of investor preferences. There are, however, a number of critiques regarding the efficacy of SRI. There are problems of transparency in terms of the information base on which these decisions are being made and different conceptions of what it means to be in compliance with such norms.

Scholars have also challenged the notion that SRI means that investors will "do well by doing good". Michael Knoll tracks SRI to turn of the century Quaker and other Christian initiatives screening investment for "sin" related activities, the shift through the 1960s to avoiding investment in war related activities, the 1980s in respect of screening for investment in the then repressive regime in South Africa to modern day screening which primarily screens for tobacco.[17] He examines the two principal claims by SRI proponents. The first is that SRI is at least as profitable and prudent an investment strategy and hence not more risky than strategies without a socially conscious component. In respect of this claim, he suggests that it may be true where markets are efficient, although this does not indicate that all SRI programs are costless.[18] The other claim is that through SRI, investors are improving society by disciplining unethical corporations.[19] Knoll suggests that whether or not ethical screening has a direct impact on targeted firms depends on the steepness of the demand curve for the corporation's securities, and that there is a lack of empirical

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[17] M. Knoll, "Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment" (2002) 57 Bus. Law 681 at 695. See also, the Social Investment Forum, as of 2001, http://www.socialinvest.org/areas/research/trends/2001-trends.htm (last accessed May 2002).

[18] Referring to situations where market prices accurately reflect available information and prices are unbiased predictors of future prices. He also observes that one must adjust for risk and that the screened portfolio must produce a higher return that an unscreened one in order to compensate for the added risk of not having a fully diversified portfolio. Knoll argues that where markets are inefficient, there is a lack of empirical support for these claims; *ibid.* at 694, 698.

[19] *Ibid.* at 642, 704.

evidence that it has a substantial impact on targeted firms' stock price and thus on their activities.[20]

According to the Social Investment Forum, as of 2001, 96% of all screened assets screened for tobacco, whereas less than 50% screen for human rights or labour standards.[21] This indicates that there are different conceptions of what it means to socially screen. Investors may or may not be aware of the scope of the screens that their funds utilize. While a screen may be avoiding investment in one type of activity, it may be directing additional investment dollars to firms that engage in repressive labour or human rights practices. Since many of the social screening agencies sell the screening as a commodity, there is little transparency in the scope of the screening and in the weights given to particular corporate conduct.

An approach that focuses solely on the synergies between shareholder wealth maximization and corporate socially responsible conduct highlights a troubling part of the debate about corporate social responsibility. In North America we have constructed an incentive and compensation system that ties bonus and earnings of senior executives to short-term earnings. Hence, the decision makers of the corporation are focused on short-term returns, which frequently diverge with long-term wealth maximization either for the corporation or the shareholders. Enron's conduct was evidence of this, prior to its self-implosion. As long as the corporation was generating generous short-term returns to its shareholders, no one, including its directors who were the beneficiaries of these returns, was scrutinizing the officers' conduct too closely. How we construct the economic incentives in the system determines the outcomes, in this case, a narrowing of the corporate focus to short-term wealth maximization.

ii. The Corporation's Obligation to Take into Account All Stakeholder Interests

The second broad approach is that in acting in the best interest of the corporation, directors and officers should take account of the interests of all those with investments or interest in the corporation. While scholars

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[20] Although in cases such as South Africa, he concedes that there was a correlation, but suggests that this is quite different from causation, *i.e.* causing South Africa to end its apartheid practices. *Ibid.* at 710.

[21] Social Investment Forum, *supra* note 17 at 710.

differ on whether this should be a direct fiduciary obligation to corporate stakeholders or an obligation to balance multiple interests or prejudice, the idea is to take account of these interests.[22] Some scholars advocating this broad approach suggest that the corporation must act as a moral community of interests and that managers should assume responsibility for a set of moral principles that facilitate economic activity by taking account of multiple interests, not privileging one group of interests over all others.[23] Recognition of such a moral obligation would necessitate the establishment of processes whereby basic principles of justice are developed with all relevant stakeholder groups, which then govern corporate decision making as an overall guide to the corporation's activities.[24] This view suggests that taking account of stakeholder interests is an imperative, rather than a discretionary power that is characteristic of

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[22] M. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 N.C.L. Rev. 1189; L.E. Mitchell, "Co-operation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Morality" (1995) 73 Texas Law Review 477 at 501-502; D. Millan, "Communitarianism in Corporate Law: Foundations and Law Reform Strategies" in L.E. Mitchell, ed., *Progressive Corporate Law* (1991). T. O'Neill, "Employees' Duty of Loyalty and the Corporate Constituency Debate" (1993) 25 Conn. L. Rev. 681 suggests that employers hold a unique power to inflict harm on their employees and hence they should owe a duty of loyalty to them. Scholars debate whether corporations should expend corporate resources either for philanthropic acts or acts that reduce harms to the community. Others have suggested a team production theory of the firm, recognizing employees and others who contribute firm-specific inputs such that the corporation must consider them constituents of the firm; M.M. Blair & L. Stout, "A Team Production Theory of the Corporation" (1999) 85 Va. L. Rev. 247. Consideration of multiple interests in corporate decision making, while not the accepted paradigm in North America, is central to a number of continental European and Asian countries, balancing objectives of generation of wealth with the interests of those diverse groups that contribute inputs to that generation of wealth. J. Cioffi, "Restructuring 'Germany Inc': The Politics of Company and Takeover Law Reform in Germany and the European Union" (2002) 24 Law & Policy 355; J. Sarra & M. Nakahigashi, "Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Culture and Norms" (2002) 24 Law & Policy 299.

[23] C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper and Row, 1975) at 103.

[24] M. Clarkson, "The Moral Dimension of Corporate Social Responsibility" in R.M. Coughlin et al., eds., *Morality, Rationality and Efficiency: New Perspectives on Socio-Economics* (Armonk: M.E. Sharpe, 1991) at 188; N. Bowie, "The Firm as a Moral Community" in R. Coughlin et al., *ibid*. 169.

US constituency statutes that do not allow any process or remedies to hold corporate officers accountable for the exercise of this discretion.[25]

In taking into account all stakeholder interests, presumably the corporation would be concerned with negative externalities from its activities, including those that cause social and economic harms. This approach is also helpful in that it seeks to internalize all costs of productive activity, including long term sustainability costs, adjustment costs for labour shedding and harms from consumer torts. The premise is that if these costs were internalized, the corporation would be more likely to engage in decisions that foster long term job skills development instead of labour shedding, human rights practices instead of harms caused by discrimination and environmentally sound practices to avoid the costs of harm and remediation that would be internalized to the corporation. The approach also has its challenges, one of which is how to ensure that corporate decision makers are accountable, given that they could justify any decision based on an expressed concern for the interests of a particular group.

Moreover, even though the current statutory language that requires directors and officers to act "in the best interests of the corporation" allows for this broader understanding of consideration of all interests implicated in the corporation, it is unclear as to who would have standing to advocate this interpretation before Canadian domestic courts and whether, given the entrenchment of shareholder primacy in the common law interpretation of this language, courts would be willing to revisit these notions absent legislative intervention. Interestingly, this is most likely to

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[25] Even where the US courts have recognized the ability of corporate directors and officers to consider stakeholder interests, they have generally found that this consideration must have a rational relationship to the maximization of shareholder value: *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986); *Paramount Communications* v. *QVC Network*, 637 A.2d. 34 (Del. 1994). Carol Greenhouse has posed the question of how globalization has affected corporate culture, the explicit set of values that are capable of being consciously created by corporate managers as one element of human resource management and corporate wealth seeking activity. She suggests that rethinking the "local" in the context of global conditions raises new challenges for understanding notions of "scale" and that law's network of jurisdictional boundaries limits our ability to use common law as a tool to analyze global versus local tensions. C.J. Greenhouse, "Figuring the Future: Issues of Time, Power and Agency in Ethnographic Problems of Scale" in B.C. Garth & A. Sarat, eds., *Justice and Power in Sociological Studies*, (Evanston: Northwestern University Press, 1998) at 108.

occur in the insolvency law context as the Supreme Court of Canada has granted leave on a case in which it will consider director and officer fiduciary obligation under corporations statutes when the corporation is financially distressed.[26] Under residual rights theory, at the point of insolvency, creditors, including employees, government claimants in respect of environmental remediation and tort claimants are the residual claimants to the firm's assets and hence there is likely a duty to consider their interests, or not to prejudice their interests, in acting in the best interests of the corporation.[27] Arguably, such an interpretation of best interests of corporation should occur much earlier in the corporation's financial life cycle. While the stakeholder conception of the corporation would formally recognize all those with an investment or interest in the corporation, it leaves unresolved the larger issue of whether or not corporations should be allowed to determine social and economic policy through their activities.

iii. The Corporation as Public Entity

The third broad approach is that corporations are public creatures, even where privately held, and that they should be required by legislation to act in a socially responsible manner, with that standard to be set by reference to domestic or international human rights and other treaties and norms. There is little support for this conception of the corporation in Canada, but it forms some of the normative basis for conceptions of the corporation in Japan and some continental European and Pan-Pacific countries. Even within these jurisdictions, there is convergence pressure by Anglo-American capital for adoption of a shareholder-centric corporate model as a condition of further investment.[28]

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[26] *Peoples Department Stores Inc. (trustee of)* v. *Wise*, [2003] Q.J. No. 505 (C.A.), online: QL (QJ), overturning *Peoples Department Stores Inc.* v. *Wise*, [1998] Q.J. No. 3541 (Sup. Ct.), online: QL (QJ), application for leave to appeal granted without reasons [2003] S.C.C.A. No. 133, online: QL (SCCA).

[27] For a discussion, see J. Sarra, "Wise People, Fiduciary Obligation and Reviewable Transactions; Directors' Duties to Creditors" in *Annual Review of Insolvency Law* (Toronto: Carswell, 2004) 67.

[28] J. Gordon, "Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany" (1999) 5 Columbia J. Eur. L. 219; Hansmann & Kraakman, *supra* note 4; J. Coffee, "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications" (1999) 93 Northwestern University Law Review 641 at 650.

The recent efforts by community coalitions to call for revocation of corporate charters where the MNE has engaged in environmental and human rights harms raises this notion of the corporation as a public good.[29] Cohan has pointed out that in the late eighteenth and early nineteenth centuries, American corporations were chartered with the integral purpose of serving public interests, that the public interest purpose was the *quid pro quo* in exchange for the limited liability corporate status.[30] He suggests that there is a growing movement that is rediscovering that the interests of corporations historically go beyond the shareholder wealth-maximization paradigm that dominates today.

3. How Can You Tell If the Corporation Is Socially Responsible?

With the move to global capital markets, these issues have become more complex, engaging a host of new challenges for thinking about corporate governance, and ultimately, for thinking about any role of social responsibility. The increased access to capital through global financial markets and the ease with which corporate charters can be transferred to new jurisdictions has allowed corporations to increase their bargaining power in respect of where they locate. They bargain in both the home and host nations for tax concessions and relaxing of environmental and labour standards. Their bargaining power lies in the ease with which many MNEs can relocate some or all of their operations to jurisdictions with low cost human capital, lower labour and human rights standards and few if any environmental protections. As noted in the introduction, the general understanding of international law as an inappropriate means to limit MNE operations means that the constraints normally imposed on corporate decision makers in respect of their conduct are largely absent, creating a serious lack of accountability for their actions internationally. The challenge is thus to explore the scope and limits of any social responsibility corporations can or should have, the link this may have to

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[29] T. Linzey, "Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations" (1995) 13 Pace Envtl. L. Rev. 219. See also CorpWatch, http://www/corpwatch.org/trac/headlines/2000/313.htm.

[30] J.A. Cohan, "Environmental Rights of Indigenous Peoples under the *Alien Tort Claims Act*, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution" (2002) 20 UCLA J. Envtl. L. & Policy 133 at 169.

effective governance and the legal processes that should be devised to serve as constraints on particular MNE activity.

Effective governance has a number of elements that are loosely linked to a corporation being socially responsible. For example, the prohibitions on officer self-dealing conduct or the need for independence and transparency in audit procedures benefit the shareholders, but also the public in terms of increasing confidence in capital markets and the spin off positive social benefits that such an active market may bring. In this sense, there is a social or public component to effective governance.

Yet the current social responsibility debate within corporate law scholarship raises additional public policy issues. Specifically, the debate is whether corporate directors and officers have the ability to engage in conduct that promotes social, economic, gender and racial equality or whether this is somehow a breach of their fiduciary obligation to the corporation. Just as we as citizens are socially situated, so too is a corporation as a separate legal personality. This is not to suggest that the corporation has or should have attributes similar to personhood. However, it is necessary to acknowledge that with the introduction of the limited liability regime and notions of legal personality, the corporation derives considerable benefits from public policies facilitating its activities and limiting the scope of liability that can be placed on either its investors or its decision makers. Of course, one of the means by which the law exercises control over the social responsibility of these decision makers and thus, the corporation they control, is through the contours of the limits to limited liability. The law's power to credibly impose personal liability on the decision-makers directly is one of the contours. The other is the indirect imposition of liability when the decision-maker unreasonably subjects the corporation's assets to legal liability as a result of, for example, environmental damage.[31]

Christopher Stone has suggested that the threat of legal liability is highly conscripted because of the nature of the limited liability corporation.[32] He observes that law is primarily reactive and hence there is a time lag between harms caused by corporate conduct and the law's

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[31] *R.* v. *Bata Industries Ltd.* (1992), 9 O.R. (3d) 329 (Prov. Div.) at 362, remedy varied on appeal (1993), 14 O.R. (3d) 354 (Gen. Div.), varied (1995), 25 O.R. (3d) 321 (C.A.).

[32] Stone, *supra* note 23 at 104.

ability to react, often too late to remedy the harms. By encouraging corporate officers to rely solely on compliance with minimum legal standards, it creates incentives for managers to ignore a whole range of production and policy choices that may contribute to harms because they come within technical compliance of the law as it existed at the time the decision was made.

With respect to measuring corporate social responsibility in environmental protection, Douglas Kysar suggests that part of the dynamic of the move to international markets has been an underlying notion that the world has an unlimited supply of material inputs and an infinite natural capacity to absorb waste outputs.[33] He suggests that sheer growth in economic activity will face an ecological limit, and hence, in addition to efficient allocation of resources and the equitable distribution of wealth, economists need to be concerned with the sustainable maintenance of scale. By incorporating scale effects into legal analysis, Kysar argues that one can also rethink the existing distributive rules that tend to be discounted in current macro-economic analysis, using the issue of sustainability to address problems of unequal distribution of wealth.

4. Going Global

The foregoing discussion highlights the current challenge. Corporations engage in wealth generating activity because of public laws and policies that act as enabling devices in this activity. Yet corporations also have the ability to contribute to political parties and hence to influence the political process regarding not only corporate law, but other laws that touch on their liabilities, such as labour or environmental law. Hence while it is argued that corporate law should not address social policy issues and that this is best left to legislatures and social welfare legislation, corporations are not prohibited from engaging in lobbying, political contributions and other measures that ensure these issues are not addressed in public policy. Moreover, some of the current challenges to sovereign nations and protection of domestic human rights and environmental norms are the result of political lobbying and consequent domestic adoption of policies of free trade, deregulation and dismantling of particular social safety nets.

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[33] D. Kysar, "Sustainability, Distribution and the Macroeconomic Analysis of Law" (2001) [unpublished, on file with author].

Increasingly, globalization poses particular challenges to the ability of domestic governments to enforce specific normative standards, particularly where corporations headquartered in the nation state have their economic activity elsewhere. It is increasingly evident that domestic law is incapable in itself of controlling the activities of MNEs, a concern where exportation of particular production activities creates harms in terms of human rights, health and safety or environmental standards.[34] It is this contradiction that must be exposed in order to determine the proper scope of corporate activity. If conceptually, the corporation is not a moral or social being within the construct of the separate legal personality, then arguably it should not have any ability to influence the election of the decision makers in respect of these issues and how these decisions are made. If on the other hand, the corporation is socially situated and should have a role in these normative debates, then how does one construct a paradigm that tempers the exercise of such powerful interests to the detriment of those with fewer resources, bargaining power and information? Are domestic attempts at regulating these activities ultimately futile given the mobility of capital and of the MNEs themselves? What will be the long term impact of "regulatory chill" in terms of both the willingness of MNEs to situate themselves in jurisdictions with few environmental standards and the inability of host or home nations to devise laws that protect their citizens from the harmful effects of unregulated environmentally harmful activity?[35] Moreover, how can one make adequate policy determinations in the absence of comprehensive

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[34] A.C. Cutler, "Private Authority and International Affairs" in C. Cutler et al., eds., *Private Authority and International Affairs* (Albany: State University of New York Press, 1999); S. Sassen, "The Spatial Organization of Information Industries: Implications for the Role of the State" in J.H. Mittelman, ed., *Globalization: Critical Reflections* (1996); R.B. Davis, "Investor Control of Multi-national Enterprises: A Market for Corporate Governance Based on Justice and Fairness?" in J. Sarra, ed., *Corporate Governance in Global Capital Markets* (Vancouver: University of British Columbia Press, 2003); C. Taylor, "A Modest Proposal: Statehood and Sovereignty in a Global Age" (1997) 18 Penn. J. Int'l Econ. Law 745; A. Aman Jr., "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest" (1999) 6 Ind. J. Global Legal Stud. 397. Moreover, the ability of domestic jurisdictions to tax corporations to in turn provide social services to ameliorate the harms is limited by the multinational nature of the corporate activity.

[35] The WTO has suggested that regulatory chill hinders the competition for capital globally, where some nations attempt to enact stronger domestic environmental protection policies. World Trade Organization, *Trade and Environment* (1999).

data that documents the impact of deregulated production activity globally?

C. How Do Those MNEs Do It Internationally

The issues are complex and at first glance appear daunting. MNEs have been implicated in nations that engage in repressive human right policies or police repression in order to engage in productive activity.[36] The historical atrocities in South Africa were one of the most glaring examples of this, but only one of many. MNEs have engaged in alleged human rights violations, activities harmful to the environment, child labour, anti-unionization activity, slavery and dangerous health and safety conditions.[37] While there may be normative disagreements about the scope of any of these activities that should be countenanced, it is fair to suggest that in the absence of a mechanism that allows for democratic development of public policy, there may be a role for home nations in ensuring that MNEs do not export the worst of environmental and labour practice where the host nation is incapable of setting its own policy.

At the same time, one has to confront the issue of arrogance of developed nations reflected in their wish to import wholesale their normative conceptions of human rights or environmental sustainability. While these debates vigorously occur among the international NGO communities and among nation states, corporations continue to engage in global activity, relatively unchecked and unscathed by these debates. Hence the question is whether there ought to be internally generated norms that could potentially complement the public policy debates of international comparative law scholars.

These issues become even more pressing as corporations move outward into other capital and production markets. It is estimated that

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[36] B. Freeman, Deputy Assistant Secretary of State for Democracy, "Human Rights and Labour" (Speech to the Third Warwick Corporate Citizenship Conference, June 10, 2000),http://www.state.gov.www.policy_remarks/2000/00710_freeman_warwicku.html. See also *Wiwa* v. *Royal Dutch Petroleum Co.* 226 F.3d. 88 (2nd Cir. 2000), that dealt with allegations that Shell Nigeria utilized police and military to quash opposition to its development activity; and *Doe* v. *UNOCAL Corp*. 248 F.3d 915 regarding alleged use of force to coerce residents to construct an oil pipeline.

[37] *Ibid.*

there are currently over 50,000 multinational enterprises.[38] A company like Unilever-Best has annual production and sales that exceed the GDP of 50 sovereign nations.[39] While foreign direct investment is heavily skewed towards developed countries, international capital is moving into developing and transitional countries at a rapid pace, often replacing more official development sources of capital into developing countries that carry with it minimum standards regarding labour or environmental protection.[40] Unlike developed countries, where there exists a framework for tempering the unchecked activities of corporations through employment standards, human rights and environmental law, many developing and transitional countries do not have the infrastructure to develop or enforce laws to address the multinational enterprise. Moreover, initiatives such as the OECD corporate governance guidelines are aimed primarily at creating legal and enforcement structures in these nations for equity capital investors.[41] Corporate codes of conduct are aimed at ensuring transparency of governance and financial reporting, and securities and credit enforcement regimes offer effective remedies for investors.[42] While these are essential to fostering investor confidence and thus healthy capital markets, they ignore the need for a host of other public policy measures that are needed to provide the appropriate balance in wealth creation and protection of those with interests in the corporation. That interest might be a direct one, in terms of investments made in labour or local infrastructure, or it may be an interest in the environmental and social impact of corporate activities on the local community and the environment. The OECD corporate governance guidelines advocate respecting domestic law

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38 R.B. Davis, *supra* note 34; G. Yaron, "Canadian Institutional Shareholder Activism in an Era of Global Deregulation" in Sarra, ed., *supra* note 34, 111; L. Mabry, "Multinational Corporations and US Technology Policy: Rethinking the Concept of Corporate Nationality" (1999) 87 Geo. L.J. 563; UNCTAD, *World Investment Report* (New York, 1995).

39 D.M. Branson, "The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance" (2001) 34 Cornell International Law Journal 321.

40 C. Williams, "Corporate Social Responsibility in an Era of Economic Globalization" (2002) U.C. Davis Law Review 705.

41 OECD Principles for Corporate Governance, http://www.oecd.ca.

42 The convergence pressure in respect of these property protections is facilitated by the importation of US experts in the design of systems and considerable pressure to have transition and developing nations adopt Anglo-American norms and legal structures without consideration of the other types of remedial protections that exist as a counterbalance in Anglo-American jurisdictions.

commitments to other stakeholder interests, but are silent on these issues where the domestic jurisdiction does not already have a developed notion of the corporation as socially situated. The growth of MNE activity across multiple jurisdictions and international trade law that facilitates free trade and limits use of principles such as the national treatment principle has diminished the domestic regulatory capability of the nation-state, raising troubling social and distributional issues.[43] The following part examines the specifics of the regulatory diminution.

1. Home, Host and the Four Problems of MNE Accountability

MNEs are organizations which, while created in one state, operate in several states through subsidiary corporate entities created in each country of operation, through contractual links in supply and delivery chains, and/or through licensing and franchise agreements. As private entities, MNEs are subject to the national law of the states in which they operate, and may also have been granted certain rights under treaties between states, rights that can be enforced in the courts of the applicable state. Certain treaties also provide for protection of investor rights against state action through binding international arbitration. Arbitration provides a dispute resolution mechanism for claims against the state by investors claiming the state regulatory or legislative actions harmed their investments. Thus a forum exists for private actors to hold public state actors accountable for decisions that harm equity investments. In contrast, however, there is no international forum in which these enterprises can be held accountable for their actions in breach of fundamental international law and conventions concerning human rights, the environment and

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[43] K. Van Wezel Stone, "Labor and the Global Economy: Four Approaches to Transnational Labor Regulation" (1995) 16 Mich. J. Int'l L 987. See also Workers in the Global Economy Project, "Report on Labor Rights—Women's Rights Advocacy Dialogue: Women's Rights and Labor Rights in Global Trade", September 1999; D. Weinberg, "Current Population Reports, A Brief Look at Post-War US Income Inequality"; "The State of Working America, 1998-99", http://epinet.org/books/swa.html; J. Burbank & R. Scott, "What the WTO means for Working Families", *Seattle Times* (December 2, 1999); F. Jameson, "Notes on Globalization as a Philosophical Issue" in F. Jameson & M. Miyoshi, *The Cultures of Globalization* (Durham: Duke University Press, 1998); F.L. Ansley, "Rethinking Law in Globalizing Labor Markets" (1998) 1 U. Penn. J. Emp. & Labor Law 2; F. Moccio, "On the Impact of Independent Contracting and Misclassification of Employees on New York State's Working Women and Families" (2000) Fineman Workshop, [unpublished, on file with the Feminist Legal Theory Project at Cornell Law School].

social/political rights. International law assigns this function to the courts of the various states, exercising their national jurisdiction over activities of the corporations that originate in or affect their territory.

Problems arise because of a number of factors, including the challenges posed by unlimited subsidiaries, reluctant host nations and the use of prudential doctrines such as *forum non conveniens* to fail to take jurisdiction for corporate harms internationally.

2. Unlimited Subsidiaries

There are two issues that arise when subsidiaries are involved. The first is that a subsidiary is provided with its own "legal personality". Thus if a subsidiary is created to mine asbestos in South Africa, then that is the legal entity to which liability will attach in the first instance. If asbestos mining causes harm, then nothing automatically attaches liability on to the parent corporation for the acts of the subsidiary, irrespective of the ownership structure. Given this situation, the incentive on the parent is to leave as few assets in the subsidiary as possible. This leaves the miners with the unenviable task of establishing direct liability through a claim the parent failed to properly supervise the subsidiary or vicarious liability for the acts of one's subsidiary.[44] Thus, parent corporations may be encouraged to transfer all of the subsidiaries' surplus assets to themselves in order to limit the loss to the MNE overall. If they are successful in doing so, they will have lessened constraints on decisions to breach international norms.

Second, the use of unlimited subsidiaries as the vehicle for corporate activities internationally means that directors and officers of controlling parent corporations are not directly liable for the actions of the subsidiary even where they are the controlling mind of the subsidiary. The construction of domestic liability regimes, judicial reluctance to draw aside the corporate veil and the practice of shifting corporate assets from the subsidiary to the parent to shield the assets from remedial claims in the host nation, create considerable barriers to MNE accountability for international activities.

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[44] *Lubbe* v. *Cape*, [2000] 4 All E.R. 268 (H.L.) at 271.

3. The Reluctant Host

There is frequently reluctance of home and/or host governments to take action against MNEs because of their importance to the country's economy or their complicity as investors in or beneficiaries of the company's activities.[45] Hence while a separate legal entity has been formed for purposes of economic activity in the host nation, the host nation may be reluctant to enact standards that may protect its citizens during the subsidiary's value generating activity in the host nation. Those who may be harmed by its activities frequently do not have access to standards within their own nation or an enforcement mechanism in order to redress or prevent harms.

4. Who, Me?

Even where remedial laws are in place in the host nation, there is an inability of the host country to impose the full sanctions of its law on the responsible parties because the corporate structure insulates the controlling corporation (domiciled in the home country) from adverse consequences of regulatory action in the host country.

The home country may be unable to impose the full sanctions of its laws on the corporation controlling the MNE for harms arising in the host country because the MNE's corporate structure creates a separate corporation in the host country. That corporation is not ordinarily subject to the jurisdiction of the home country's courts for its actions in the host country. In some instances, there is the likelihood that the home country court, even where it finds it has the legal jurisdiction to hear a case against the MNE for the actions of its subsidiaries in another country, will exercise its discretion not to hear the case on the grounds of one or more of the prudential doctrines, such as *forum non conveniens*, state action, comity or public policy.

Finally, there is the difficulty of the lack of a forum capable of exercising jurisdiction over the MNEs on the basis of universality jurisdiction, other than under the *Alien Tort Claims Act* (ATCA) in the United States federal courts.[46] The *Alien Tort Claims Act* grants federal

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[45] Branson, *supra* note 39.

[46] 28 U.S.C.S. s. 1350 (1994). There is also the *Torture Victim Protection Act*, H.R. Rep. No. 367 (1992), establishing a cause of action for torture. This statute is not

jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". It is largely a jurisdiction granting procedural statute, providing a federal forum in which foreign complainants can bring a tort action against a US based MNE for torts arising from violations of customary international law.[47]

However, in considering a claim under the *Alien Tort Claims Act* in the federal courts of the United States of America, plaintiffs would once again face the problems of subject-matter jurisdiction and *forum non conveniens*, with the additional problem of establishing personal jurisdiction over a foreign corporation in the US.[48] Subject matter jurisdiction has been taken under *ATCA* with respect to the actions of corporations "only for the most egregious violations of civil and political rights and for violations of international humanitarian law".[49] Thus while the *ATCA* specifies that US courts will take jurisdiction over alien tort claims arising from a violation of the law of nations or a treaty of the United States, the courts have held that the "law of nations" is a vague concept and that it

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discussed here, however, to date, this has not proven an effective vehicle for redressing the claims of torture victims.

47 A. Rosencranz & R. Campbell, "Foreign Environmental and Human Rights Suits against US Corporations in US Courts" (1999) 18 Stan. Envtl. L.J. 145.

48 If a Canadian corporation has no contacts in the United States, or those contacts are conducted through subsidiaries, there may not be sufficient presence to establish jurisdiction—*Doe* v. *Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 2000) [hereinafter *Unocal*] although in another case, establishing an investor relations office in New York was sufficient to establish general personal jurisdiction—*Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000) [hereinafter *Wiwa*), *cert*. denied, 69 U.S.L.W. 3628 (US Mar. 26, 2001) (No. 00-1168). J. Cohan, *supra* note 30, who argues for a collaborative community focused process between governmental, indigenous and corporate entities to try to find a common ground of information and mutual interest in the protection of human and environmental rights. H. Osofsky, "Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations (1997) 20 Suffolk Transnational Law Review 335 who argues that claims that environmental human rights are part of the law of nations under the *ATCA* are very strong in the context of indigenous peoples. He argues that these norms are at least as strong as torture and that while human rights norms will evolve over time, claims of extreme harm to indigenous peoples should be recognized and pursued now; *ibid.* at 382, 395.

49 The Editors, "Developments in the Law—International Criminal Law: Part V Corporate Liability for Violations of International Human Rights Law" (2001) 114 Harvard Law Review 2025 at 2037. Cohan, *ibid.* observes that most cases granting jurisdiction are for violation of *jus cogens* norms, such as rape, torture, genocide and slave trading.

may include international norms of such fundamental importance, such as the right not to be tortured or to be subjected to slavery or cruel and inhuman punishment.[50] To date, there has been no remedy awarded against a US based MNE under the *ATCA*. Generally, the courts have refused to recognize environmental harms as a tort within the meaning of the statute, frequently dismissing such claims for lack of subject matter jurisdiction absent *jus cogens* abuses.[51]

John Christopher Anderson has documented how complicity between an MNE and a host nation creates harms.[52] He analyses the activities of US based Unocal, which entered into a joint venture gas drilling project in Burma (Myanmar) with SLORC, the ruling military body, and highlights ongoing alleged human rights abuses, forced labour, rape and acts of torture.[53] In contrast to other MNEs that have exited the country because of the repressive regime, Unocal has argued that it is staying to ameliorate the human rights violations.[54] Yet Anderson documents the scope and extent of human rights abuses being condoned by Unocal. A class action lawsuit by citizens of Burma against Unocal and two executives has been sanctioned to proceed under the US *Alien Tort Claims Act*, on the basis that Unocal has been complicit in human rights violations, including alleged violence, torture, rape and forced relocation in connection with the

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[50] *Kadic* v. *Karadzic*, 70 F.3d 232 (2nd Cir. 1995). Breed suggests that the *Kadic* judgment eliminated the state action requirement in certain cases when it found that the *ATCA* could be used against private individuals in certain circumstances of egregious harms: L.M. Breed, "Regulating Our 21st Century Ambassadors: A new Approach to Corporate Liability for Human Rights Violations Abroad" (2002) 42 Va. J. Int'l L. 1005 at 1016. He calls for a model in the United States that would allow the federal Department of Justice to bring actions against US corporations for international human rights abuses, similar to prosecutions under the *Foreign Corrupt Practice Act* which allows it to bring actions against corporations utilizing bribery to influence foreign officials; *Foreign Corrupt Practice Act*, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as am. by *Omnibus Trade and Competitiveness Act of 1988*, 15 U.S.C. 78.

[51] Rosencranz & Campbell, *supra* note 47 at 155.

[52] J.C. Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2 U. Pa. J. of Labor & Emp. Law 463 at 474-490.

[53] State Law and Order Restoration Council (SLORC), established when the military in Burma seized control in 1988 and changed its name to Myanmar. Anderson documents a series of repressive acts engaged in by the SLORC: *ibid.* at 463-465, 474-496.

[54] Unocal, "Our Position", http://www.unocal.com/responsibility/humanrights/hr1.htm (last accessed July 2003).

pipeline project.[55] While the US government has now banned business operations in Burma, the ban applies only to new business and not existing business, thus excluding Unocal.[56] Anderson observes that to date, no US corporation has ever been held liable under the *ATCA* for benefiting from human rights abuses.

However, one case is currently pending that raises the possibility that environmental claims constitute a tort recognized under international law. This is a class action on behalf of 30,000 Indigenous people and farmers in the Ecuadorian Amazon Basin and 25,000 downstream residents of Peru for personal and environmental damages from Texaco for alleged toxic discharges that caused air, soil and water harms and considerable human health harms. It is the first case in which a US court granted jurisdiction to foreign indigenous peoples seeking damages for environmental tort claims.[57]

In Canada and other jurisdictions, there is no legislation similar to the *ATCA* and hence such a policy instrument, as limited as it is, does not exist to provide extra-territorial jurisdiction to hold MNEs accountable for their foreign harms.[58] The "Who, me" problem thus poses several critical challenges. The first is that there are no legal mechanisms in Canada that would allow Canadian citizens to challenge the harmful activities of our domestically registered MNEs internationally. Where there are no legal processes in the host nation for seeking either remedial or preventive remedies for corporate harms, those harmed are left without remedies and without any legal vehicle to seek to alter the corporation's conduct. Sheer

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55 *Doe* v. *Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

56 Anderson, *supra* note 52 at 469.

57 *Aguida* v. *Texaco, Inc.* 142 F.Supp.2d 534 (S.D.N.Y. 2001).

58 Canada recently enacted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, aimed at implementing the Rome Statute of the International Criminal Court in respect of genocide, crimes against humanity and war crimes, that grants extra-territorial jurisdiction to Canadian courts to hear and decide cases. This statute does not address the corporate conduct described in this paper. This act may be applicable to the most egregious harms. Crimes against humanity are defined in s. 7 as acts when committed as part of a widespread or systematic attack against any civilian population, including murder, enslavement, forcible transfer of population, torture, rape, persecution against any identifiable group on grounds of race, culture, gender or nationality, apartheid… Hence it covers some of the same acts as the *ATCA*. However, there have been no published cases to date under this legislation and hence its scope vis-a-vis corporations is unknown.

distance from the jurisdiction can give rise to a particular apathy or unwillingness among the citizens of the home nation to investigate or be concerned about child labour or dangerous working conditions in the host nation. The "Who, me" problem extends beyond the issue of exercise of consumer preference in dealing with products of the impugned corporation, it goes to the heart of the scope and limits of democratic processes and the willingness of domestic citizens to engage their legislators in pressure to implement legal mechanisms to govern the harmful activities of MNEs abroad.

5. Racing to the Bottom of the Market

The absence of easily accessible methods of enforcing international law norms has seen some evidence that MNEs are exploiting the release of social responsibility constraints to the maximum. Recently, there have been a number of instances where individuals and groups are collaborating internationally to exert some pressure on corporations in terms of their accountability to larger groups in society. For example, in the manufacturing sector, the export of production and assembly work has carried with it issues regarding payment of living wages and working conditions that are hazardous to the health and safety of the workers. While the standards in respect of these concerns are relatively rigorous in developed countries, within a range of norms that protect basic health and safety, minimum wages and prohibitions against racial, gender and other discrimination, these standards either do not exist or are not enforced in many host nations. There are serious consequences both for the workers in the host nations, in terms of their long term health and well being, and for workers in developed countries where labour shedding has led to a downward spiral of economic and social harms.

The beneficiaries of these trends are the MNEs. The liberalization of labour markets has meant that in the home state, the MNE can exert considerate economic pressure to dismantle standards and make the home nation "more competitive" in a market in which the MNE has generated the competition. Failure to accede to these demands results in plant and industry closures and exportation of the economic activity elsewhere, where the host nation is so anxious for jobs and economic activity, that it undertakes to allow the corporation to operate relatively unfettered. This undermines the effective power of nations to regulate domestic labour law

and social policy.[59] This trend is complicated enormously by free trade treaties and the limits of national treatment doctrines in providing some balance to stakeholder interests engaged in corporate value generating activity.

Scholar Cynthia Williams has observed that particular features of globalization accentuate the problem of relying on law as an external constraint in addressing the relation of corporations to society, in particular, sovereign nations are unable to impose substantive limits on international economic actors.[60] She suggests that where there are laws in place, the high mobility of capital and the lack of an international sovereign means that there is a diminished capacity to tax and hence to spend money on social welfare programs that address the distributive harms caused by corporate activities.[61]

III. THE CHALLENGE OF MNE SOCIAL RESPONSIBILITY: THE GLOBAL ECONOMY AND THE ADMINISTRATION OF JUSTICE

A. Where Can You Hear the Voice of Corporate Social Responsibility?

There are corporations in Canada and elsewhere that have adopted codes of corporate conduct and/or human rights codes for their operations in host nations, based on the domestic norms of their home jurisdiction or international norms. For example, Nexen Inc. helped to develop an International Code of Ethics for Canadian Business as a template for Canadian businesses to follow when conducting business domestically and abroad.[62] The Code suggests that business should take a leadership role through establishment of ethical business practices; and that while national governments have the prerogative to conduct their own affairs in accordance with their sovereign rights, all governments should comply

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[59] UN ESCOR Division for Social Policy and Development, *Report on the World Social Situation*, 1999, http://www.un.org/esa/socdev/rwss97c0.htm.

[60] Williams, *supra* note 40 at 724. In this, she is addressing both MNEs and capital market participants.

[61] *Ibid.*

[62] Nexen Inc., http://www.nexeninc.com/Our_Commitment/Corporate_Governance (last accessed October 2003).

with international treaties and other agreements that they have committed to, including the areas of human rights and social justice. Its code also suggests that its business activities internationally should be consistent with its practices in Canada. The Code specifies that it values human rights and social justice; wealth maximization for all stakeholders; operation of a free market economy; public accountability by governments; a business environment that militates against bribery and corruption; equality of opportunity; protection of environmental quality and sound environmental stewardship; community benefits; good relationships with all stakeholders; and stability and continuous improvement within its operating environment. The Code further specifies that the corporation will engage in meaningful and transparent consultation with all stakeholders and attempt to integrate corporate activities with local communities as good corporate citizens; ensure activities are consistent with sound environmental management and conservation practices; provide meaningful opportunities for technology cooperation, training and capacity building within the host nation; support and respect the protection of international human rights within the corporation's sphere of influence; ensure the health and safety of workers is protected; strive for social justice and respect freedom of association and expression in the workplace; and ensure consistency with other universally accepted labour standards related to exploitation of child labour, forced labour and non-discrimination in employment.[63]

Clearly, the establishment of such codes of conduct by some MNEs is an important effort at corporate social responsibility by some domestically registered corporations, tied to standards that are set by democratic processes in the home nation. Their value may be in creating a climate in which corporate social responsibility is given voice. However, such codes continue to be voluntary and unenforceable, although they may give rise to reasonable expectations of investors concerning the conduct of the corporation that may provide grounds for an oppression application or other action for failure to implement the code in the home state. There is generally neither a requirement of mandatory disclosure concerning whether or not the codes are being complied with nor any internal or external monitoring of compliance. One question is whether or not investor markets or consumer markets will recognize and encourage such initiatives.

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[63] *Ibid.*

While these codes are voluntarily generated, many of them commit corporations to adhering to international standards developed by international organizations. For example, signatories to the Global Compact are committed to complying with the ILO Declaration on Fundamental Principles and Rights at Work, which calls for the abolition of child labour, the elimination of employment discrimination and the recognition of the right to collectively bargain working conditions.[64] The ILO itself plans an ambitious progress assessment and annual monitoring strategy, although the potential success of this as a strategy to create normative pressure on MNEs is not yet known, since the Declaration has only recently come into force.[65] Adoption by corporations of these principles may also create some normative pressure on them to comply with these principles. As will be discussed below, perhaps it is these codes that MNEs should be required to comply with in the preliminary stages of trying to enforce international standards for MNEs.

Concerns have been raised about voluntary codes of conduct and whether they are window dressing designed to appeal to consumer or investor preferences or to give the impression of social responsibility without any real commitment. Such charges have been aimed at corporations such as sportswear manufacturer Nike, in its hiring of a former United Nations ambassador to investigate its international operations and assess whether operations comply with the corporation's internal code of conduct.[66] This initiative was both lauded as socially responsible behaviour and criticized as a marketing technique. While there was disclosure of findings from this investigation, another report by an external auditor that indicated that the code was not being enforced in Nike's international operations was not disclosed until it was leaked to the media.[67]

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[64] International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, http://www.ilo.org/public/english/standards (last accessed October 2003).

[65] *Ibid.*

[66] Levi Strauss & Co., *Social Responsibility, Sourcing Guidelines (2001)*, http://www.levistrauss.com/responsibility/conduct (last accessed October 2003).

[67] S. Greenhouse, "Nike Shoe Plant in Vietnam is Called Unsafe for Workers" *The New York Times* (November 8, 1997) A1, reported that Ernst & Young Inc. had found unsafe conditions and illegal wages rates in Nike's Vietnamese shoe factory. Nike had failed to comply with its own code.

Hence, while there are some voluntary initiatives aimed at the social responsibility of MNEs, there is a continuing problem of disclosure and of enforceability that must be addressed even where one hears the voice of corporate social responsibility. Monitoring of compliance with voluntary codes is also a challenge, both internally for the MNE in respect of its subsidiary operations and externally in terms of access to information for investors, consumers and other interested parties. Unless such standards are enforceable, corporations can opt in or out of their own voluntary standards without any consequences, creating incentives to do so whenever it is convenient.

Another issue is what corporations have called the political and cultural sensitivities of the host nation. An example would be nations where women or particular racial groups are not given access to employment, or if they are, their compensation reflects highly discriminatory practices. Respecting the cultural norms of the host jurisdiction in such a case runs contrary to international human rights and is offensive to Canadian law regarding equality rights. The MNE's continued investment in the host nation that supports inequitable employment practices results in further dollars being invested to perpetuate gender and race discrimination. While it is important not to impose Western norms on other nations, it is appropriate to hold those nations to international norms set through democratic international efforts. The socio-cultural differences cannot be used, as they are now, to justify discriminatory and repressive labour practices and unaccountable environmental harms.

B. How Can the Voice Be Heard?

If markets punish the MNE, then actions that trigger that punishment will become breaches of fiduciary duty. The problem is that reliable information about MNE activity is not available. As has been pointed out with respect to the attempts to control MNEs through the consumer market, meaningful standards of behaviour and reliable information about the compliance of the MNE with those standards in all aspects of its operations are extremely scarce.[68] This makes it harder for markets to

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[68] N. Roht-Arriaza, "Private Voluntary Standard-Setting, the International Organization of Standardization and International Environmental Lawmaking" (1995) 6 Yearbook of International Environmental Law 10 at 152-153, points out that the ISO 14000 standard requires neither public information on performance nor adherence to any particular standard, merely the implementation of certain management systems.

function efficiently. In addition, some of the lessons from the financial markets would indicate the need for international standards and credible, consistent reporting on compliance in order for a corporate governance market to work. As Stéphane Rousseau has pointed out, a regime of voluntary disclosure of corporate governance information makes it difficult to distinguish between accurate reporting and window dressing, and this may lead to an adverse selection problem.[69] That is, if the information that the investors have about the quality of corporate governance does not enable them to distinguish the corporations with good corporate governance from those with problematic governance, this difference will not be reflected in their prices.[70]

Corporate law tries to mitigate the problems for financial markets caused by asymmetric information by mandating regular disclosure of relevant financial information and regulating insider trading. However, in the area of corporate governance, and especially with respect to compliance with international norms of human rights, environmental, political and social rights, there is no highly developed regulatory scheme of disclosure and verification to mitigate the inability of investors to judge corporate quality.

C. Designing Incentives to Be Responsible Through Remedies

One possible initiative is to require corporate reporting of a range of corporate activities that now need to be reported only where they affect the financial statement of the corporation. By enhancing the definition of materiality, corporations could be required to disclose transactions internationally and domestically that create particular social and environmental harms. While these may not affect the short term financial reporting of the MNE, they do have long term potential downside risks that investors and the public generally should be able to assess. While expression of investor preference is not an adequate mechanism in itself to temper the conduct of

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M. Shaughnessy, "The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct" (2000) Col. J. Int'l Environmental Law & Policy 159 has reported the problem of voluntary codes lacking a legal mechanism through which to enforce compliance.

69 S. Rousseau, "Canadian Corporate Governance Reform: In Search of a Role for Public Regulation" in Sarra, ed., *supra* note 34 at 3.

70 G.A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 The Quarterly Journal of Economics 488 at 490-491.

MNEs internationally, it could provide one tool in beginning to influence these corporate activities.

Scholar Faith Kahn has reflected on silence and power in corporate and securities law, analyzing the legislature, courts and the US Securities and Exchange Commission and the development of corporate philanthropy.[71] She observes that while the law and economics movement highlighted the private law contractual aspect of corporate law and its normative notions of efficiency, modern philanthropy law deals with how the corporation as a social institution engages with the culture and community that surrounds it, performing a distributive role. While corporate law has accommodated the notion of the socially active corporation, securities and corporate law fail to provide investors with the right to have disclosure about the social activities, positive and negative, of corporate activity, including corporate charitable and political contributions, and many employment and environmental practices. Kahn observes that limited social disclosure has signalled to investors that they are free to disregard the social effects of corporate practices.

Hence, the lack of disclosure creates problems for a consumer market for socially responsible behaviour, both in making investment determinations and in creating incentives to consider these issues as an investment or consumer criteria. Douglas Kysar has suggested that with very few exceptions, consumer product manufacturers are only ever legally required to disclose health and safety risks or other material attributes that inhere in the end product itself and that therefore threaten to harm or mislead the purchaser directly.[72] He observes that increasingly, consumers are demanding specific information about the manner in which goods are produced, such as whether they were developed using sweatshop labor, animal cruelty, unsustainable harvesting practices, genetically engineered ingredients, or other processes about which consumers express strong views and strong preferences.

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[71] F. Stevelman Kahn, "Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law" (1997) 41 New York School Law Review 3.

[72] D.A. Kysar, "Preferences for Processes: The Process-Product Distinction and the Regulation of Consumer Choice" [unpublished, draft paper on file with author], cited with permission.

However, Kysar notes that the impetus to regulate access to such information is taking the form of a conceptual distinction between processes and products in which the former are not considered a legitimate basis for distinction by either consumers or regulators, at least so long as such processes do not manifest themselves significantly in any physical characteristics of the actual end products.[73] Kysar notes that the common justification for these efforts to manage the consumer's information environment is a belief that lay individuals lack sufficient knowledge or cognitive capacity to evaluate the scientific, economic, or political significance of process information. He suggests that the growing impulse of policy-makers has been to restrict the decisional matrix of consumers to information concerning products only, both because such information is thought to bear more directly than process information on the risk and utility to be expected from the end product.[74] Joseph Spoerl has observed that preferences are not exogenous, derived from the nature of the individual. Rather, markets and individuals are co-dependent and preferences shape markets but these markets shape preferences. Hence corporate managers are shaping consumer preferences in the way in which they promote particular product choices and shape disclosure.[75] Another consideration is whether we wish to continue to have a system in which equity investor preferences or consumer preferences determine socially responsible behaviour. Kellye Testy has observed that there is a risk of

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[73] Kysar suggests that the process-product distinction has appeared most prominently in international trade negotiations, as member nations of the World Trade Organization have struggled to determine the extent to which foreign imports may be conditioned on compliance with domestic regulatory standards for processes and production methods, including rules regarding the voluntary or mandatory disclosure of process information by product manufacturers. Part of the issue is whether there is sufficient state interest to force or otherwise strictly regulate disclosure of information by manufacturers concerning production processes. *Ibid.* See also J.C. Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2 U. Pa. J. Lab. & Emp. Law 463; C. Stone, *supra* note 23 who observes that consumer preferences as able to influence corporate social responsibility assumes that consumers know of the harms created by particular corporate practices, that they know where to apply pressure and are capable of applying pressure and that any pressure is translated into warranted changes in the corporation's behaviour. These assumptions are contestable.

[74] *Ibid.* He then considers arguments for and against the use of product labels and other means of down-streaming information regarding production processes to aid consumer decision-making.

[75] J. Spoerl, "The Social Responsibility of Business" (1997) 42 Am. J. Juris. 277 at 295-297; Ostas, *supra* note 10.

commodification of corporate social responsibility in pursuit of shareholder wealth, with these commodity preferences easily retracted if consumer preferences change.[76] Thus, mandating expanded reporting requirements alone may be insufficient to ensure greater corporate social responsibility since the preferences of consumers or investors for greater social responsibility will still govern the outcome, rather than the public policy in favour of compliance with international law norms of human rights, environmental protection and respect for social and political rights.

D. Tempering the Conduct of MNEs

Arguably, the challenge of MNE activity and socially responsible behaviour globally, while daunting, is not insurmountable. There may be a role for stakeholders, for collaborative initiatives that foster broader consensus on the meaning of corporate socially responsible behaviour, and a role for administrative justice in home nations taking responsibility for the global activities of their MNEs. I give three examples as illustration:

1. Stakeholder Initiatives

Recently, there have been a number of instances where individuals and groups are collaborating internationally to exert some pressure on corporations in terms of their accountability to larger groups in society. An example is the Coalition for Justice in the Maquiladoras, comprised of religious groups, labour unions, environmental and human rights groups committed to promoting socially responsible corporate practices in labour and human rights along the Mexican—US border.[77]

Legal scholar Claire Dickerson has suggested that the behaviour of multinational corporations indicates a growing willingness to recognize the rights of stakeholders other than shareholders.[78] She tracks this as a shift from the West-North focus on the norms of the individual to an East-South focus necessitated by globalization, with a growing emphasis on

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[76] K.Y. Testy, "Linking Progressive Corporate Law with Progressive Social Movements" (2002) 76 Tulane Law Review 1227.

[77] J. Perez-Lopez, "Promoting International Respect for Workers' Rights Through Business Codes of Conduct" (1993) 17 Fordham Int'l L.J. 1.

[78] C. Dickerson, "Human Rights: The Emerging Norm of Corporate Social Responsibility" (2002) 76 Tulane Law Review 1431.

collective human rights. Dickerson uses the example of world wide negative publicity in 2001 aimed at the pharmaceutical companies when they resisted lowering the sale price of anti-HIV/AIDS drugs to ameliorate the pandemic that has taken over 16 million lives and infected an additional 33 million people in South Africa. Consumer groups, the United Nations and other organizations mounted sufficient pressure that the pharmaceutical countries agreed to lower their prices and to withdraw their suit regarding the South African law permitting manufacture of generic drugs.[79] In turn, Dickerson suggests that corporate behaviour casts its own social influence on society at large; thus when the behaviour conforms to international human rights norms, it reinforces those norms with all members of the community, including developed-country consumers. Dickerson observes that the emergence of norms in this unstructured, more broadly based process is being bolstered by the more formal codification process.

Broadly based movements such as the World Social Forum may also ultimately have an impact on corporate conduct.[80] Its focus is not on building global consensus or engaging in concerted efforts to enforce international norms through existing legal institutions. Rather it is aimed at creation of an international forum to allow discussion among broad groups of social, political and NGO actors; its strategy is one of information dissemination and policy debate, encouraging a climate for support of more individualized domestic and international enforcement strategies.

There is a valid critique of corporate responses to collective stakeholder pressure. This stems from the notion that corporations have as their objective the generation of surplus value and that any means of externalizing costs to generate this value is legitimate. Only external constraints temper this activity, and as discussed above, the mobility of capital has meant that external constraints are increasingly being diminished. Corporations respond to specific pressure regarding their

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[79] *Ibid.* See also Joint Communiqué from Secretary-General and Seven Leading Research-Based Pharmaceutical Companies on Access to HIV/AIDS Care and Treatment, SG/SM/7982, AIDS/34 (October 4, 2001), http://www.un.org/News/Press/docs/2001/sgsm7982.doc.htm; B. Barber, "Global Groups Seek AIDS Drugs for Poor Patients: Drug Firms Back Off from Patents" *Washington Times* (March 19, 2001) A13.

[80] World Social Forum, http://www.wsf (last accessed September 2003).

international activities only as far as they need to. Corporations may also adopt codes of conduct as a means of attracting capital from socially responsible investment funds, without a stronger normative commitment to implement these practices. Finally, the issue is whether such codes are adopted to facilitate the entry of corporations into new markets, where the host nation may be looking for a commitment to particular practices. Dickerson offers an optimistic response to this critique by suggesting that the motives of multinationals in their adoption of codes of conduct are irrelevant to the impact that such adoption entails, because the norms emerge through an unstructured process akin to democracy; and that as corporate behaviour begins to recognize the human rights of a collective whose individuals are relatively powerless, these will become norms.[81]

2. Collaborative Initiatives

There is also some potential for collaboration across government, corporations, financial institutions and NGOs. There are recent initiatives that may improve the quality and comparability of information available about an MNE's operations. The Coalition of Environmentally Responsible Economies (CERES) and the United Nations Environment Project (UNEP) have jointly convened an ambitious project, funded by UNEP, entitled the "Global Reporting Initiative" (GRI). The GRI has developed "Sustainability Reporting Guidelines" to be used by MNEs to provide information with respect to their economic, environmental and social performance globally. The purpose of the guidelines is summarized as follows:

> This will encourage the creation of markets that can then punish breaches.
>
> The GRI seeks to make sustainability reporting as routine and credible as financial reporting in terms of comparability, rigour, and verifiability. …
>
> A generally accepted framework for sustainability reporting will enable corporations, governments, NGOs, investors, labour, and other stakeholders to gauge the progress of organizations in their

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[81] Dickerson, *supra* note 78 at 231, citing Levi Strauss & Co. code of conduct that purports to regulate suppliers' labour practices. See Levi Strauss & Co., *supra* note 66.

implementation of voluntary initiatives and toward other practices supportive of sustainable development. At the same time, a common framework will provide the basis for benchmarking and identifying the best practices to support internal management decisions.[82]

GRI is creating a permanent organization to promote and develop the guidelines. The members of the permanent organization include the reporting corporations themselves, UNEP, non-governmental organizations, and some national government agencies. Although the present Guidelines provide for self-reporting, the GRI is attempting to obtain consensus on an appropriate set of rules addressing independent "verification" or "assurance" concerning any reports generated using the GRI Guidelines.

There are more than 2,000 companies currently voluntarily publishing environmental, social or sustainability reports.[83] The GRI's *Sustainability Reporting Guidelines* are the result of a broad-based consultative process with multinational corporations, environmental groups, human rights, labour and government stakeholders. The GRI reports that it has consulted with more than 10,000 stakeholders in developing the Guidelines. It also reports that 194 corporations in the auto, utility, consumer products, pharmaceutical, telecommunication, energy and chemical sectors have adopted all or part of the guidelines.

Intuitively, the influence is likely to be interactive. With a growing number of Canadian corporations becoming signatories to the Global Reporting Initiative, there will be some normative pressure domestically to import similar standards of social and environmental reporting and accountability. Recent changes to corporations statutes in Canada may have created an enhanced means for investors to express preferences in terms of corporations adopting governance standards that take account of environmental protection, human rights and other basic standards.

However, reporting under these guidelines, as with many other such initiatives, is entirely voluntary. In addition, the reports themselves do not provide any standards against which to judge the types and levels of activities reported. They provide information about the trends in the various activities reported, and leave it to the individual investor to

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[82] "Global Reporting Initiative Overview" http://www.Globalreporting.Org/AboutGRI/Overview.htm (last accessed August 5, 2003).

[83] http://www.globalreporting.org/about/faq.asp.

determine whether sufficient progress is being made and whether the level of activity reported is acceptable or not. For example, the engineering reports concerning the state of environmental controls could be reported as an investment in environmental engineering by the parent corporation. There does not appear to be any mechanism that would require the corporation to link the commissioning of the report to its willingness to follow the report's recommendations.

Similarly, the initiatives of the UN Global Compact are aimed at encouraging voluntary corporate citizenship supporting nine principles drawn from the *Universal Declaration of Human Rights*, the ILO *Declaration on Fundamental Principles and Rights at Work* and the *Rio Declaration on Environment and Development*.[84] The objective is to create partnerships with private and public actors, premised entirely on voluntary compliance and notions of responsible corporate citizenship, including the protection of international human rights and greater environmental responsibility. Fifty MNEs committed themselves to the Global Compact when it was launched in 1999, although the commitment to stewardship is voluntary and there are no enforceable standards. Environmental groups and human rights organizations have viewed the Global Compact with a degree of skepticism because of its voluntary nature.[85]

It is not yet clear what the long-term impact of these collaborative efforts will be. Cooperation by MNEs may in many cases be contingent on the non-mandatory nature of participation. Yet the lack of enforceable standards and remedies for violations of codes of corporate conduct results in those harmed by MNE conduct not being able to seek redress for those harms. Moreover, it can sometimes be difficult to identify "international norms", for example, the Rio Declaration is a "soft law" instrument and with a few exceptions, its principles are non-legally binding. While the line between hard law and soft law does not detract from my argument, it

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[84] http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/thenine.htm (last accessed October 1, 2003). *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, which provides human rights standards, including the rights of life, liberty, security of person, assembly and association, the right to vote, freedom of movement, freedom from unjust labour practices, etc. The Rio-Declaration specifies that human beings are at the centre of concern for sustainable development and that they are entitled to a healthy and productive life in harmony with nature, *Rio Declaration*, Principle 1, U.N. Doc. A/Conf.151/26 (vol. 1).

[85] Shaughnessy, *supra* note 68 at 171-172.

may pose additional challenges for recognition and enforcement of universally accepted norms.[86] At the same time, the substance of these voluntary codes suggests that some MNEs have, at least on paper, outpaced their domestic governments in their willingness to accept international principles as the basis of their conduct. While a more pessimistic view might suggest that voluntary adoption has been driven in part by a strategy of MNEs to reduce the likelihood of legislated standards, the public adoption of corporate codes endorsing international human rights standards and environmental norms, sets the stage for more formal codification of these standards.

3. The Role of the Administration of Justice in Home Nations in Taking Responsibility for Global Activities of their MNEs

This is a more contested notion. Ideally, there would be international mechanisms developed that would offer enforceable standards that would control particular corporate activity that violates internationally accepted norms of social responsibility. There would also be international consensus on a tribunal that could hear and decide cases alleging harms by MNEs for their activities in host nations, with processes designed to generate meaningful access for both those harmed and NGOs or other groups recognized by the tribunal as having *amicus curiae* or actual standing to seek remedies for particular harms. This is not likely to occur in the immediate future as there is not international consensus that an international mechanism to hold MNEs accountable is required or desired, nor is there consensus on the standards to which they should be held accountable for actions in host nations.

In the interim, there is the issue of a role for domestic legal processes in enforcing international standards for the activities of domestically registered MNEs abroad. Initial strategies could include enacting legislation that allows the home nation to take jurisdiction and to award remedies for MNE harms internationally; imposing fiduciary obligations on corporate directors and officers in respect of the corporation's international activities; or expanding the scope of materiality in corporate disclosures of their activities domestically and abroad.

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[86] Thanks to my colleague Professor Karin Mickelson for making this observation.

4. Would Domestic Legislation Aimed at Extraterritorial Jurisdiction Assist?

If in going global, MNEs have left much of the rule of law behind, perhaps there should be domestic legislation aimed at imposing some level of responsibility on MNEs for their actions in foreign jurisdictions. As noted in Part III, the US *Alien Tort Claims Act* has proven an inadequate remedial tool because of subject matter jurisdiction and doctrines such as *forum non conveniens*. In designing a statutory regime, one can draw on failures of the US regime to conceptualize a framework that may address the problems raised in this paper.

I would propose a new domestic statute that grants Canadian courts extraterritorial jurisdiction for the international activities of domestically registered MNEs in respect of human rights, labour standards and environmental protection. Provisionally titled the Canada *MNE Standards of Global Conduct Act* (*MSGCA*), it would set up a mandatory disclosure and compliance regime, measured against both international treaties and norms and the standards voluntarily adopted by the corporation.[87] Rather than a focus on torts with its attendant problems in terms of thresholds of causation and harm, the focus would be on enacting enforceable standards of corporate conduct. Ideally, there would be a democratically, nationally set standard of conduct that engaged standards such as the *Universal Declaration of Human Rights*, the ILO *Declaration of Fundamental Principles and Rights at Work* and the *Rio Declaration on Environment and Development*. MNEs with their home jurisdiction in Canada would be required to comply with these international standards.

The statute would contain language that would allow for the development of new international norms of conduct. In the context of the US *ATCA*, Hari Osofsky has suggested a standard for judging new norms as they emerge, specifically, that there must be wide declaratory recognition that the norm exists, such as uncontroversial UN resolutions, a preponderance of scholarly or judicial opinion or incorporation of the

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[87] I note parenthetically that corporations operating solely domestically should also be required to adopt codes of conduct, but in this paper do not address the legislative design problems associated with corporations that vary considerably in size and sophistication.

norms in many nations' statutes.[88] Allowance for recognition of new norms means that the courts are less likely to narrowly interpret the statutes.

Under the proposed *MNE Standards of Global Conduct Act*, MNEs would also be required to comply with standards that they have set in their own codes of conduct. While the statute would require adoption of a corporate code of conduct for any MNE registered in Canada regarding both its domestic and international conduct, the content of that code would be voluntary as long as it raised standards above the international norms referred to above. This requirement would have two effects. First, there would be a level of consistency and fairness in the standards set, with the international human rights, labour and environmental standards setting the baseline of conduct that is in turn enforceable in the home jurisdiction. Corporations would also be required to abide by the codes of conduct that they have adopted. This will create *ex ante* incentives for corporations to devise codes that they are prepared to adhere to, thus addressing the problem of codes being adopted purely for marketing purposes or to satisfy perceived investor preferences. The corporation would always be free not to adopt standards above the international baseline of human rights, environmental and labour standards, but even in those circumstances, there would be mandatory disclosure, monitoring and enforceable remedies for violation of the baseline standards. While directors and officers as agents of the corporation would still have due diligence defences available, there would be remedies against the corporation for failure to meet standards and for harms caused due to this failure. In some cases, where the directors and officers failed in their duties, liability could be imposed on them personally, a point discussed in the next section.

In order for such legislation to work, the *MNE Standards of Global Conduct Act* would specify a statutory pulling aside of the corporate veil for the limited purpose of hearing and deciding complaints concerning MNE activities in host nations in respect of human rights, labour standards or environmental harms. Otherwise, the problem of the unlimited subsidiaries would defeat any such legislative initiative. Canadian courts have already developed doctrines for such a pulling aside of the veil, but the legislation would have to go further in order to properly hold MNEs

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[88] Osofsky, *supra* note 48 at 368. Osofsky suggests that lack of geographical comprehensiveness, weak enforcement mechanisms or non-conforming state behaviour would not be a bar to recognition of new norms.

accountable for the actions of their subsidiaries. This would also address the problem of subsidiaries in host countries shifting assets continually to the parent to insulate themselves from claims for harms in the host country, as the MNE would be treated as one entity for the purpose of assessing the complaints and remedying any harms. It would still leave the problem of subsidiaries that are joint ventures of corporations registered domestically in several jurisdictions, but in such a case, the domestically registered corporation that is a joint partner or shareholder could be prohibited from investing or engaging in joint ventures where such standards are not being met, and held to a good faith and due diligence standard in determining whether or not it has fulfilled its obligations.

The *MNE Standards of Global Conduct Act* would of necessity have to have a liberal definition of who should be able to bring a claim against the corporation. As has been evident with the *Alien Tort Claims Act* in the United States, standing to bring claims is problematic, as is the issue of resources to pursue claims, particularly in light of the resources of the MNE. Under the *MNE Standards of Global Conduct Act*, any party that is directly implicated or harmed by the corporation's activities would have standing to bring a complaint, including citizens of the home or host nation. This would include investors, employees, in some cases creditors, and communities in host nations suffering the harms of the foreign activities of the domestically registered MNE. While the legislation should provide for intervenor status for human rights, environmental or labour groups or NGOs, either as parties with an interest or in an *amicus curiae* role, there would need to be at least one complainant with a direct interest in the MNE's activities. While the cost of pursuing such proceedings is likely to deter NGOs and advocacy groups pursuing frivolous claims, on balance, it would seem that there should be an least one directly involved complainant, in terms of due process and fairness. A key balance to this limitation would be a very liberal definition of "interest" in the corporation's activities, with the courts giving such remedial legislation an expansive, as opposed to narrow interpretation of "complainant". If "complainant" is defined and interpreted liberally, a major hurdle to enforcing the standards of the statute will be overcome.

Moreover, there should also be a mechanism for a public body to bring a complaint against a domestic corporation for its activities internationally. Similar to a privacy ombudsperson or a human rights commissioner, there could be a Director of MNE Standards of Conduct that would have standing to investigate and bring complaints under the *MNE Standards of Global Conduct Act*. This would ensure that resources and standing were

not a bar to enforcement of the legislation. Such positions have also historically acted as a normative check on the activities of corporations, because corporate officers understand that there are standards specified in the legislation and that there is an enforcement mechanism in place aimed at holding them accountable to such standards.

The Director of MNE Standards of Conduct could also engage a variety of dispute resolution mechanisms to resolve complaints and try to move those engaged in a complaint into a proactive and collaborative resolution. In this sense, pursuit of the complaints through the courts would be the mechanism utilized when it is evident that the corporation is unwilling to meet the legislative standards. In the absence of enforceable remedies, upheld by the courts, any legislation would not have the persuasive power necessary to temper the conduct of domestically registered MNEs internationally. Claire Dickerson has suggested that there be a good faith norm that is reflected in consultation and dialogue with developing country workers such that they can work towards some sort of consensus on working conditions and labour standards that reconcile the legitimate interests of workers and the corporations.[89] This notion of preventive mediation of interests is highly appealing. Yet there are serious barriers to such a process posed by information asymmetries, inequitable bargaining power and the lack of international enforceable norms. The statute would have to expressly address these barriers to effective resolution of disputes and to pursuing claims for remedies under the statute.

Enacting the *MNE Standards of Global Conduct Act* also raises the question of whether domestically registered MNEs would exit Canada. Is there a risk of exit? Of course, just as there is also a risk of exit with existing Canadian labour, human rights and environmental standards. However, Canadian registered corporations are also beneficiaries of a highly codified enabling regime, including a generous tax regime, securities legislation that encourages active capital markets, a corporate law regime that enables corporate activity and protects agents of the corporation in their good faith and duly diligent efforts to oversee and manage the corporation. These publicly regulated features of private wealth generating activity make Canada an attractive domestic jurisdiction

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[89] C. Dickerson, "Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing Country Workers" (2001) 53 Fla. L. Rev. 611 at 616.

for corporations. These features are not compromised by holding corporations accountable to international standards.

Resistance to enactment of legislation would of course be expected; the objective of corporate activity is to generate wealth efficiently, including lobbying politically for conditions that are most advantageous for the corporation. However, the objective of democratic processes is that as citizens, we are engaged in an ongoing challenge of finding the appropriate balance between various economic and social objectives and activities. Wealth creation is only one of many competing policy objectives, in addition to the health, safety, security and equality of Canadian citizens and a whole host of other public policy initiatives. Clearly, the move to global capital and products markets has shifted that balance, causing a redistribution of wealth away from citizens, both in terms of access to the benefits of global activities and in terms of harms to health and environment from those activities. The *MNE Standards of Global Conduct Act* would serve as a corrective device. It would have some distributive consequences, but the current policy choice not to enforce international standards also has distributive consequences. The proportional harms to citizens of host nations from the current imbalance that is the result of unaccountable corporate behaviour far exceeds any potential "harm" to corporate activity in imposing such standards and creating enforceable remedies. However, if numerous Canadian based MNEs have already adopted and are promoting the Global Compact, they have at least voluntarily already committed to these international standards. The legislation would codify these standards, raise other corporations up to these minimum standards and more importantly, provide a mechanism whereby the corporations would be held accountable to such standards.

Finally, there is likely to be the efficiency critique of such proposed legislation. Essentially, this critique would suggest that the *MNE Standards of Global Conduct Act* is unnecessary interference in the market, creating *ex ante* incentives for corporations to relocate in different domestic jurisdictions and to dismantle their existing voluntary codes of conduct because of the fear of being held accountable for these standards. However, if one analyses these arguments, they are claims that the legislation would impair efficiency because corporations that adopt standards of conduct do not want to be accountable for failing to implement them nor do they want to be accountable if they violate international law norms. Thus, the efficiency critique brings us back to first principles, which are the normative constraints we wish to impose on international corporate activity. In essence the critiques are normative

claims that the present lack of any real constraints on this activity is a preferable situation.

E. Imposing Fiduciary Obligations

Instead of enacting my proposed statute, corporate law fiduciary duty could be expanded to encompass international law norms in respect of the environment, human, social and political rights. If these protections were considered baseline standards for corporate conduct in the home state of the corporation, it might act as a temper on breach of such standards by corporate managers in their decisions regarding corporate conduct in the host nations. Any intentional or negligent breach of these norms would subject the MNE manager involved to sanctions similar to those for breaches of fiduciary duty in a domestic setting. This may create the appropriate incentives for corporate directors and officers to engage in conduct that would meet the standards of the home nation in the corporation's dealings internationally. It would address the current missing element, that there is no threat or risk to corporate assets from conduct internationally that would be a breach of the duty to act in the best interests of the corporation domestically.

In addition to rethinking concepts of fiduciary obligation, or enacting extraterritorial legislation there are other strategies to be considered to address the challenges of corporate social responsibility globally.

F. Mandatory Reporting on Social and Environmental Activities

One interim strategy is to mandate social, environmental and human rights reporting similar to that undertaken by GRI and CERES, instead of it remaining voluntary. While shareholder activism in respect of international human rights or labour norms was effectively quashed by corporate law language that prohibited expression of shareholder preference for any political or social cause, the 2001 amendments to the *Canada Business Corporations Act* now allow greater possibility for resolutions that address issues related to the corporation's activities. Some recent shareholder activity has also focused on human rights issues and a push for greater transparency in corporate decision making in respect of foreign labour practices.[90] A recent proposal regarding sweatshop

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[90] SHARE, "Labour Investors Gather Broad Support in Anti-Sweatshop Vote" 1 (Spring/Summer 2001) Prospectus 4, online: SHARE http://www.share.ca (under

employment practices garnered 36% of shareholder support at the corporation's annual meeting, the largest vote ever recorded in support of a social resolution submitted to a Canadian corporation.[91]

G. Supporting International Codes of Conduct Through Trade Preferences

Another strategy that has found favour in the European Union is to encourage host nations to require socially responsible corporate behaviour from MNEs in their country through treaties incorporating this strategy. In this respect, the Commission of the European Union issued two communications dealing with globalization. The first is a communication setting out its approach to the issue of social governance and promotion of core labour standards in its trading relations with other states ("Core Labour Standards Communication").[92] In the communication, the Commission rejects sanctions as the appropriate method for promoting such standards. Instead, the Commission prefers strengthening the role of the ILO and its complaint mechanisms by providing technical assistance to the ILO.[93] The communication also approves of denying preferential access to EU markets to products from countries that permit violations of the ILO's core conventions.[94]

"Newsletters", last accessed: June 1, 2003). Similarly, Real Assets Investment Management Inc. and Meritas Mutual Funds recently jointly filed a shareholder resolution with Calgary-based Enbridge Inc. calling on it to adopt a human rights policy. The shareholder proposal was withdrawn after Enbridge agreed to adopt the US-U.K. Voluntary Initiative on Security and Human Rights, and to engage in discussions with shareholders and human rights groups on how it will be implemented.

91 SHARE, News Release, "Record Numbers Support Shareholder Resolution at The Bay on Sweatshops" (May 23, 2002), online: SHARE http://www.share.ca (under "News Releases", last accessed: June 1, 2003).

92 Commission of the European Communities, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*, Communication to the Council, the European Parliament and the Economic and Social Committee, Communique COM (2001) 416 final (18/7, 2001).

93 *Ibid.* at 14.

94 *Ibid.* at 16-17.

The Commission also published a "Green Paper" on corporate social responsibility ("CSR").[95] The Green Paper envisions the role of the European Union as that of promoting CSR through provision of a "framework" that provides transparency, coherence and best practices, and by assisting in the development of the appropriate evaluation and verification tools. The Green Paper does not discuss the European Parliament's 1998 resolution concerning a model code of conduct for MNEs and the creation of a Monitoring Platform. The potential for the creation of such a model code is present in the proposed "framework" and it could arguably result from the consultation process following the issuance of the Green Paper.[96] However, the Commission was expressly refraining from making any concrete proposals in the Green Paper because the discussions concerning the role of the EU in corporate social responsibility were only at the preliminary stage.[97]

Following the consultation, the Commission issued a Communication to European Institutions and Member States setting out a proposed strategy on CSR for the Commission ("EU Communication").[98] The EU Communication presented a definition of corporate social responsibility that emphasized its voluntary nature, its intimate links with sustainable development and its dimension of exceeding minimum legal standards.[99] It also recognized the global dimensions of CSR by referring to the need to develop an effective system of "global governance" including social and environmental dimensions. The EU Communication then went on to refer to globalization bringing "increased exposure to transboundary economic criminality, requiring an international response".[100] However, the international response envisioned by the Commission is to follow the strategies of encouraging compliance with international standards, and using trade preferences to encourage compliance outlined in the Core

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95 Commission of the European Communities, *Promoting a European Framework for Corporate Social Responsibility*, Green Paper COM (2001) 366 final (18/7, 2001).

96 *Ibid.* at 22.

97 *Ibid.* at 23.

98 Commission of the European Communities, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, Communication to European Institutions, Member States, Social Partners and other concerned parties COM(2002) 347 final (July 2, 2002).

99 *Ibid.* at 5.

100 *Ibid.* at 6.

Labour Standards Communication discussed above, and extending it to all areas of Corporate Social Responsibility.[101] The Commission also identified problems with transparency and comparability of standards for measuring CSR and, in response to this and other problems, created an EU Multi-stakeholder Forum on CSR which is to report in the summer of 2004 on a number of topics, including: the effectiveness and credibility of codes of conducts, to be based on internationally agreed principles, in particular the OECD guidelines for multinational enterprises; the development of commonly agreed guidelines and criteria for CSR measurement, reporting and assurance; the definition of commonly agreed guidelines for labeling schemes, supporting the ILO core conventions and environmental standards; and disclosure of pension and retail funds SRI policies.[102]

Thus, the issue is not only how international norms may play a role in domestic enforcement of particular codes of conduct, but whether investment and trading policy can be deployed to require particular standards of conduct in other jurisdictions regarding human rights and other protections that conform to Canadian understandings of essential freedoms. Is there likely to be compliance with such international standards in the absence of either domestic standards or an international forum that holds corporations accountable for particular kinds of harms?

H. Domestic to International, International to Domestic Norms—Potential Synergies

It would seem that multiple strategies are required to develop a model of corporate governance that addresses the full range of issues highlighted above. This requires engagement in international fora, with both governmental and NGO organizations and domestically in terms of laws that engage corporate activity.

The role of the judiciary is a challenging one. While limited by the scope of legislation or domestic jurisdiction, the courts do have a role in both domestic and international norms. For example, in insolvency law, there are growing numbers of cross-border insolvency restructurings and Canadian courts have recognized the need for co-operation and comity

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101 *Ibid.* at 22-25.

102 *Ibid.* at 17-18.

among jurisdictions. This presents a challenge in balancing domestic standards aimed at particular public policy objectives and the principle of comity, as well as consideration of the implications for access to justice for those who do not have the resources to enforce their claims in another jurisdiction.

CONCLUSION

One of the primary objectives of the Canadian Institute for the Administration of Justice, which helpfully provided the research funding for this paper, is to foster debate and collaboration on the administration of justice. Too frequently, corporate law dismisses the issue of the administration of justice as a "public law issue" that does not engage the "private law" of corporate activity, capital markets and international trade and competition law. It is important to guard against the identification of international law norms with increasing shareholder wealth. It is important to recall that they are first and foremost public law norms that vindicate important human values, irrespective of their impact on shareholder wealth. A new vision of corporate law may include wealth redistribution, a reduction in subordination and discrimination based on race and gender, environmental justice and enhanced social democracy. The private law/public law distinction in the corporate law area is becoming increasingly blurred as corporate activities impose social and economic costs on individuals and communities. Similarly, the remedies available through the justice system to redress these harms or encourage particular standards of conduct increasingly engage both public and private law aspects of corporate governance. We need to enhance our understanding of these trends and begin to develop a corporate law regime more broadly responsive to the issues raised by increasingly global activity.

It is hoped that such an endeavour will also provide insights for how conflicts in norms would be resolved within the Canadian administrative justice system. This involves investigation into aspects of Canadian corporate law that may generate efforts by Canadian investors, workers and community members to import international norms or standards into Canadian corporate conduct. This would require not only consideration of recent statutory changes, but also some investigation into whether the courts or other dispute resolution fora are being utilized to place this on the public agenda. It also requires further conceptualization of the relationship between the courts as arbiters of public law and the increasing predominance of private arbitration, domestic and international, where

private binding dispute resolution impinges on or bypasses public law standards. This in turn necessitates deeper inquiry into the design of a dispute resolution framework within Canadian legal processes that may allow consideration of international norms and their impact on corporate activity domestically. It is only through an explicit vindication of the public law norms concerning basic human, social, environmental and political rights expressed in our international law in decisions concerning the governance of our domestic MNEs that the appropriate balance will be struck in the public versus private conception of the corporation.

L'impact du droit international sur l'évolution du droit canadien du travail*

Gilles TRUDEAU**

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La conférence de cette année s'intéresse à l'impact de la mondialisation de l'économie sur le contenu et l'évolution du droit. Ce thème revêt une connotation inquiétante, voire même dramatique, lorsque appliqué au domaine du travail. En effet, l'effectivité du droit du travail traditionnel – le droit positif canadien en ce domaine en est un exemple typique – menace de se dégrader dans un contexte économique de plus en plus mondialisé. Certains voient dans le droit international du travail une façon de diminuer la gravité de cette menace. La réflexion proposée dans ce texte porte sur cette question, en prenant le droit canadien comme sujet d'observation.

Le droit international du travail ne peut représenter une avenue intéressante que dans la mesure où il est susceptible d'être effectivement reçu et appliqué dans les différents droits nationaux des États auxquels il est destiné. Malgré l'existence de plusieurs normes internationales impératives en la matière, l'expérience canadienne démontre que le droit interne du travail peut s'avérer bien peu perméable à leur influence. C'est dans ce contexte que le rôle des tribunaux domestiques est névralgique : ils peuvent significativement contribuer à la réception du contenu et des valeurs du droit international du travail en droit interne.

La première partie de cet exposé décrit les défis et les difficultés que la mondialisation de l'économie représente pour le droit du travail et la protection qui en découle pour les travailleurs. Le contenu du droit international du travail est déjà riche, et son application effective serait certes susceptible de limiter les effets les plus néfastes de la mondialisation de l'économie sur la protection sociale des travailleurs. La deuxième partie de l'exposé analyse le contenu et les caractéristiques des principaux instruments internationaux auxquels le Canada est lié. L'effet de ces instruments sur le contenu du droit canadien du travail est toutefois compromis par les mécanismes qui, au Canada, pourvoient à leur réception en droit interne. Ces mécanismes sont décrits dans la troisième partie de l'exposé. L'analyse démontre que malgré tout, le droit canadien

évolue à ce sujet, et que les tribunaux font une place grandissante aux valeurs et aux normes qui émanent du droit international du travail.

Quelques mots s'imposent auparavant sur le phénomène de la mondialisation actuelle de l'économie. Ce phénomène, que certains appellent aussi « globalisation », se situe dans un processus continu d'internationalisation du capitalisme, celui-ci ayant par nature une vocation internationale. Ce qui caractérise la phase actuelle de la mondialisation, ce sont autant les transformations dans l'organisation internationale de la production des biens et services que le développement d'instruments nouveaux qui supportent les échanges commerciaux internationaux. Les auteurs s'accordent généralement pour observer non seulement une augmentation sans précédent de ces derniers, mais aussi une transformation dans les stratégies, tant financières que productives, des entreprises multinationales, un accroissement de l'investissement étranger direct, une mobilité jusqu'ici inégalée des capitaux et des activités productives, le tout selon une logique de plus en plus déterminée par les marchés financiers internationaux. Ces transformations favorisent les entreprises multinationales qui en retirent les plus grands bénéfices et qui constituent le principal vecteur de cette mondialisation.

I. LES DÉFIS DE LA MONDIALISATION POUR LE DROIT DU TRAVAIL TRADITIONNEL (NATIONAL)

La mondialisation récente de l'économie risque d'affecter sérieusement le cours du droit du travail. Ce risque découle surtout du pouvoir accru dont jouissent, grâce à la mondialisation, les entreprises multinationales face aux deux autres acteurs des systèmes nationaux de relations industrielles[1]. En effet, alors que la mobilité des activités productives des entreprises multinationales s'exerce bien au-delà des frontières nationales, l'action des syndicats et celle de l'État demeurent pour l'instant essentiellement nationales. Il en résulte un avantage qui pourrait permettre aux entreprises multinationales de provoquer une diminution significative du niveau de protection que le droit national du

[1] Cette question a déjà été étudiée dans Marie-Ange MOREAU et Gilles TRUDEAU, « Le droit du travail face à la mondialisation de l'économie », (1998) 53 *Relations industrielles – Industrial Relations*, n° 1, 55–89, dont une partie de l'analyse est reprise ici. Voir aussi Patrick MACKLEM, « Labour Law Beyond Borders », (2002) 5 *Journal of International Economic Law* (à paraître).

travail assure aux salariés. Deux phénomènes se conjuguent pour produire un tel risque : l'un est externe au droit du travail, l'autre lui est interne.

II. LA MONDIALISATION, UNE MENACE EXTERNE AU DROIT DU TRAVAIL

Du point de vue externe, le droit du travail fait désormais partie de la compétition que se livrent les territoires nationaux et les États pour attirer l'investissement et l'emploi. La réglementation du travail dans un territoire national, avec son caractère propre, contribue à le particulariser comme lieu d'investissement. Les entreprises multinationales, jouissant d'une mobilité accrue de leurs activités et de la libéralisation des conditions du commerce international, peuvent jouer les États les uns contre les autres quant aux conditions de leur implantation. Cela risque d'entraîner la réglementation sociale étatique dans une spirale vers le bas qui pourrait être significative quant à l'évolution future du droit du travail. Il ne faut pas voir dans ce risque la perte de tout pouvoir des États nationaux face aux entreprises multinationales. Il suggère simplement que celles-ci jouissent d'un pouvoir accru face à l'État, et aussi face aux syndicats, ce qui leur permet d'exiger des conditions qu'elles jugent plus favorables à l'investissement.

La scène canadienne foisonne d'exemples récents du phénomène. Ainsi, le patronat s'est opposé vivement aux réformes que le gouvernement québécois entendait apporter au *Code du travail* en 2001, et à la *Loi sur les normes du travail*, en 2002. Dans les deux cas, le discours était le même : ajouter des contraintes aux entreprises en augmentant le niveau des conditions de travail imposées par la loi, ou en en créant de nouvelles, nuit à la position concurrentielle des entreprises québécoises aux niveaux national, continental et mondial. Une intervention accrue de l'État en ce domaine ne peut que décourager l'investissement direct en sol québécois et la création d'emplois. Le même scénario s'était déroulé sur la scène fédérale, lors de la révision du *Code canadien du travail* en 1998[2].

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[2] Ainsi, en réponse au mouvement syndical qui revendiquait l'inclusion d'une disposition prohibant l'embauche de salariés occasionnels pour remplacer les grévistes au cours d'une grève légale, le groupe de travail que le ministre fédéral du Travail avait institué pour formuler des propositions de réforme écrivit ceci: « Les employeurs prétendent que l'adoption d'une loi anti-briseurs de grève créera un

Ces exemples illustrent comment la mondialisation de l'économie donne au monde patronal un puissant outil de lobbying face à l'État. Quant à ce dernier, il risque d'être sensible à ce lobby et, dans un contexte de mondialisation, de percevoir son champ d'action dans le domaine des relations du travail comme étant plus limité.

III. LA MONDIALISATION, UNE MENACE INTERNE AU DROIT DU TRAVAIL

La mondialisation de l'économie menace le droit du travail aussi sur le plan interne, risquant ainsi de porter atteinte à son effectivité. Ce droit, dont l'application est limitée au territoire national d'où il est issu, ne dispose pas des outils nécessaires pour appréhender toutes les activités des entreprises multinationales établies sur ce même territoire[3]. Il s'agit ici d'une autre conséquence d'un phénomène déjà mentionné : l'entreprise multinationale est supranationale dans son action, alors que l'effet du droit du travail est essentiellement national. Un droit national peut difficilement prendre en compte les activités qu'exerce une entreprise à l'étranger même si celles-ci ont un impact sur le territoire national. En d'autres termes, une entreprise multinationale ne peut, à partir d'un droit national donné, être tenue responsable de l'ensemble de ses actions, celles de toutes ses composantes, devant une seule juridiction. Elle est plutôt responsable de façon morcelée, devant chaque juridiction nationale, pour la part limitée de ses activités qui se déroule sur le territoire national considéré. Cette effectivité tronquée du droit du travail national face aux actions de l'entreprise multinationale confère un avantage considérable à cette dernière. Ainsi, il n'est pas imaginable pour l'instant que le droit puisse imposer à une entreprise multinationale de reconnaître un syndicat à l'échelle de l'ensemble de ses opérations, et de négocier avec celui-ci une convention collective de travail « globale ». De la même façon, aucun instrument juridique ne favorise le déclenchement d'une grève transnationale commensurable à l'étendue des activités d'un employeur

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environnement hostile aux investissements et les privera de sources de capitaux, ce qui entraînera des pertes d'emplois et affaiblira la sécurité d'emploi [...]. »

Voir : Andrew C.L. SIMS, Rodrigue BLOUIN et Paula KNOPF, *Vers l'équilibre*, Ottawa, Ministre des travaux publics et services gouvernementaux du Canada, 1996, p. 126. Le professeur Blouin fut dissident sur cette question.

[3] Sur cette question, consulter : Pierre VERGE et Sophie DUFOUR, « Entreprises transnationales et droits du travail », (2002) 57 *Relations industrielles – Industrial Relations*, n° 1, 12-47.

multinational : un tel mouvement serait plutôt assujetti aux conditions de légalité définies par le droit de chaque territoire national où il pourrait se manifester.

Idéalement, le droit du travail international devrait compléter les différents droits nationaux et limiter l'impact des risques que la mondialisation fait peser sur le droit du travail. En effet, en établissant des normes internationales communes et contraignantes, le droit international devrait permettre d'éviter la compétition entre les États à partir de la réglementation sociale et de limiter les risques d'une spirale vers le bas à cet égard. De plus, en favorisant l'harmonisation de la réglementation sociale applicable à l'entreprise, partout où elle s'implante, le droit international peut contribuer à contraindre les entreprises multinationales à répondre de tous leurs actes, quel que soit l'endroit où elles les posent.

IV. LES PRINCIPAUX INSTRUMENTS DU DROIT INTERNATIONAL DU TRAVAIL LIANT LE CANADA

Le droit international du travail n'est ni monolithique ni issu d'une source unique. Il a vu le jour dès le début du 20e siècle, dans la foulée de la première phase d'industrialisation, et s'est développé au cours des décennies suivantes, à la faveur de l'évolution de la conjoncture économique[4]. Plusieurs sources, dont chacune correspond à une logique et à des objectifs différents, l'alimentent aujourd'hui. La première, la plus ancienne et la plus importante, est sans contredit constituée des différents instruments émanant de l'Organisation internationale du travail (O.I.T.). A celle-ci s'ajoutent les dispositions pertinentes de la *Charte internationale des droits de l'Homme* adoptée par l'Organisation des Nations Unies (ONU) après la Deuxième Guerre mondiale. Enfin, une autre source du droit international du travail est apparue beaucoup plus récemment, cette fois au niveau continental ou régional. Il s'agit notamment des dispositions à caractère social incluses dans les traités internationaux de commerce, comme celles rattachées à l'ALÉNA. Cette section présente succinctement certains des principaux instruments qui composent le droit international du travail et qui lient le Canada.

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[4] Le lien entre les différentes phases de l'internationalisation du capitalisme et l'évolution du droit international du travail a été exploré dans Marie-Ange MOREAU et Gilles TRUDEAU, « Les normes du droit du travail confrontées à l'évolution de l'économie : de nouveaux enjeux pour l'espace régional », (2000) 127 *Journal de Droit international*, no 4, 915-948.

V. LES CONVENTIONS DE L'ORGANISATION INTERNATIONALE DU TRAVAIL (O.I.T.)

Créée en 1919, l'O.I.T. a, au fil des ans, élaboré une œuvre normative considérable qui forme le cœur du droit international du travail. Cette œuvre se concrétise dans des normes internationales du travail qui prennent généralement la forme de conventions et de recommandations. La convention est toutefois le seul instrument de l'O.I.T. qui crée des obligations juridiques à l'égard d'un État dès lors que celui-ci l'a ratifiée. Il faut aussi mentionner la *Déclaration de l'OIT relative aux principes et droits fondamentaux au travail et son suivi*, adoptée en 1998 pour répondre à certains des problèmes les plus criants que la mondialisation de l'économie pose pour la protection sociale des travailleurs[5]. Les principes et droits fondamentaux qu'énonce la Déclaration sont obligatoires et lient les États-membres même s'ils n'en ont pas ratifié les conventions afférentes[6].

Des quelques 180 conventions que l'O.I.T. a adoptées à ce jour, le Canada n'en a ratifiées que 30, dont 28 sont encore en vigueur. Il s'agit là d'une réalisation fort modeste en comparaison du Mexique, par exemple, qui en a ratifiées 77 (67 en vigueur). Par contre, l'autre partenaire du Canada au sein de l'ALENA, les États-Unis, ne s'est formellement lié qu'à 13 conventions (11 en vigueur). Comme il sera souligné dans la prochaine section, le caractère fédéral du système constitutionnel canadien n'est pas étranger à cette timide performance[7].

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[5] Sur l'origine et le contenu de la déclaration, consulter Hilary KELLERSON, « La Déclaration de 1998 de l'OIT sur les principes et droits fondamentaux : Un défi pour l'avenir? », dans J. TWAITHES (dir.), *La mondialisation, origines, développement et effet*, Québec et Paris, Les Presses de l'Université Laval et l'Harmattan, 2000, p. 261-267.

[6] Selon l'article 2 de la *Déclaration*, il s'agit des droits suivants : a) la liberté d'association et la reconnaissance effective du droit de négociation collective (conventions 87 et 98); b) l'élimination de toute forme de travail forcé ou obligatoire (conventions 29 et 105); c) l'abolition effective du travail des enfants (convention 138 et 182); d) l'élimination de la discrimination en matière d'emploi et de profession (conventions 100 et 111).

[7] Pour une analyse des motifs à la base de la non-ratification d'un grand nombre de conventions par le Canada, voir Brian LANGILLE, « Canada's Unratified Core ILO Conventions—A New Look », document non publié du 28 octobre 1996.

On peut classifier les conventions de l'O.I.T. auxquelles le Canada est lié en trois catégories. La première, comprenant les conventions les plus anciennes en fait, concernent des conditions de travail minimales, comme la durée du travail, l'âge minimum pour le travail dans certains secteurs, le repos hebdomadaire et les méthodes de fixation des salaires minima. La deuxième catégorie comprend le plus grand nombre de conventions et vise des normes très spécifiques pour des industries particulières, surtout celle du transport maritime. Enfin, la dernière catégorie représente les cinq conventions fondamentales du travail que le Canada a ratifiées[8].

VI. LES INSTRUMENTS INTERNATIONAUX ÉTABLISSANT LES DROITS DE L'HOMME

Comme la très grande majorité des pays de la communauté internationale, le Canada est partie prenante aux grands instruments juridiques internationaux élaborés au sein de l'Organisation des Nations Unis (ONU), dans les années qui suivirent la Deuxième Guerre Mondiale, pour assurer la reconnaissance et la protection des droits fondamentaux de la personne humaine[9]. Parmi leurs dispositions y figurent des droits et libertés qui sont à la base même du droit du travail contemporain.

La Charte internationale des droits de l'Homme est un ensemble constitué de quatre instruments : la *Déclaration universelle des droits de l'Homme*, le *Pacte international relatif aux droits économiques, sociaux et culturels*, le *Pacte international relatif aux droits civils et politiques* et le *Protocole facultatif* se rapportant au *Pacte international relatif aux droits civils et politiques*. Même si d'autres textes adoptés sous l'égide de l'ONU et garantissant aussi des droits fondamentaux de la personne s'ajoutent à ces quatre textes, c'est dans ces derniers que figurent les dispositions les plus pertinentes au droit du travail.

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8 Il s'agit des conventions n° 87, 100, 105, 111, et 182. Le Canada n'a pas ratifié la Convention n° 98 sur le droit d'organisation et de négociation collective.

9 Voir, de façon générale, Claude EMANUELLI, *Droit international public*, Montréal, Wilson et Lafleur Ltée., 1998, p. 369 et suiv.; William A. SCHABAS, *International Human Rights Law and the Canadian Charter*, 2e éd., Scarborough, Carswell, 1996, p. 55 et suiv.

La *Déclaration universelle des droits de l'Homme,* adoptée en 1948 par l'Assemblée générale de l'ONU présente les droits de l'Homme comme un idéal commun à atteindre par tous les peuples et toutes les nations. Elle inclut dans les droits universels et fondamentaux de la personne plusieurs droits à connotation sociale et économique dont la liberté syndicale, la sécurité sociale, de même que des conditions de travail et une rémunération équitables et satisfaisantes[10].

La Déclaration ne contient aucune disposition concernant sa mise en œuvre sur le plan national ou le contrôle de son application. Elle a une valeur déclaratoire et promotionnelle, mais aucune force obligatoire[11]. Bien qu'ayant voté en faveur de l'adoption de la Déclaration à l'ONU, le Canada ne l'a pas formellement mise en œuvre en droit interne. Par contre, elle est à la base du développement législatif considérable quant aux droits de la personne au Canada et est même expressément mentionnée dans le préambule de quelques lois en la matière[12].

Les principes énoncés dans la Déclaration sont repris de façon plus contraignante dans les deux Pactes adoptés ultérieurement par l'ONU. Dans le *Pacte international relatif aux droits civils et politiques,* voté par l'Assemblée générale de l'ONU en 1966, plusieurs droits et libertés fondamentaux ayant application de le domaine du travail sont énoncés, dont la prohibition du travail forcé (article 8), la protection de la vie privée (article 17), le droit d'association (article 22) et la prohibition de la discrimination à partir de certains facteurs énumérés (article 26). Le Pacte est complété par le *Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques*, qui instaure un mécanisme supplémentaire de mise en application.

Le *Pacte international relatif aux droits économiques, sociaux et culturels,* aussi adopté en 1966 par l'ONU, reprend de façon plus détaillée les droits de nature sociale et économique que la *Déclaration universelle des droits de l'Homme* contient, et vise à leur donner une force

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[10] *Déclaration universelle des droits de l'homme*, art. 22 à 25.

[11] On peut par contre soutenir qu'en dépit de l'absence d'un aspect contraignant directement issu de ses dispositions, la déclaration a acquis une force coutumière sur le plan international, et, à ce titre, lie tous les États. Voir John P. HUMPHREY, « La nature juridique de la Déclaration universelle des droits de l'homme », (1981) 12 *Revue générale de droit*, 397.

[12] Jacques-Yvan MORIN, Francis RIGALDIES et Daniel TURP, *Droit international public*, 3e éd., t. 1, Montréal, Éditions Thémis, 1997, p. 671.

obligatoire. Ceux-ci sont énumérés dans une formulation un peu plus détaillée. L'État adhérant au Pacte ne s'engage toutefois pas à une obligation de résultat mais plutôt, selon les termes de l'article 2, « […] à agir, tant par son effort propre que par l'assistance et la coopération internationales, notamment sur les plans économique et technique, au maximum de ses ressources disponibles, en vue d'assurer progressivement le plein exercice des droits dans le présent Pacte par tous les moyens appropriés, y compris en particulier l'adoption de mesures législatives ».

Le Canada a adhéré au *Pacte international relatif aux droits civils et politiques* et au Protocole s'y rapportant en 1976. Il a aussi ratifié la même année le *Pacte international relatif aux droits économiques, sociaux et culturels*. Ces instruments n'ont cependant pas été directement introduits dans la législation canadienne[13].

Il faut ici souligner le double emploi mais aussi la complémentarité des grands instruments internationaux des droits de l'Homme avec plusieurs conventions de l'O.I.T. qui reconnaissent aussi des droits fondamentaux reliés au travail. A cet égard, la *Déclaration de l'OIT relative aux principes et droits fondamentaux au travail et son suivi* est particulièrement significative. Elle permet en effet que ces droits fondamentaux bénéficient de tout le système de mise en application déployé par l'Organisation internationale du travail qui, par sa nature tripartite, revêt un caractère tout à fait particulier[14]. Par ailleurs, ce rapprochement des droits de l'Homme et du droit du travail qui survient sur le plan international ne sera pas sans influencer le cours des droits du travail nationaux, comme l'exemple canadien décrit plus loin le suggère.

VII. LES INSTRUMENTS CONTINENTAUX ET RÉGIONAUX

Le processus d'intégration commerciale des Amériques soulève plusieurs préoccupations quant à l'évolution des droits relatifs au travail dans les différents pays impliqués. Celles-ci se reflètent notamment dans plusieurs traités, protocoles et déclarations adoptés récemment au sein des Amériques[15] qui reconnaissent explicitement les droits fondamentaux du

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13 *Id.*, p. 277.

14 *Id*.

15 Pour une description et une analyse de ces différents instruments, voir Pierre VERGE, « La place des droits relatifs au travail dans le projet d'intégration des Amériques », (2003) 44 *Les Cahiers de Droit*, n° 1, 53-73.

travail. Bien que le Canada soit partie à ces instruments, il n'est pas utile de les analyser davantage ici, ceux-ci se rapprochant sensiblement des traités et conventions énumérés plus haut, tant dans le contenu des droits du travail reconnus que dans les effets juridiques qui y sont rattachés.

L'*Accord nord-américain de coopération dans le domaine du travail* (ANACT), qui constitue en fait la clause sociale[16] de l'Accord de libre-échange nord-américain (ALÉNA) conclu entre le Canada, les États-Unis et le Mexique et entré en vigueur le 1er janvier 1994, mérite une analyse plus approfondie[17]. Il s'agit là de la première clause de cette nature insérée dans un traité multilatéral de commerce. Sous certaines conditions, l'Accord permet d'imposer des sanctions commerciales à l'État partie qui ne respecterait pas ses engagements de nature sociale.

Il faut voir dans l'ANACT un accord de coopération avant tout. Les trois pays ont résolument misé sur la coopération dans le domaine social afin de favoriser l'épanouissement des droits sociaux reconnus dans le texte de l'Accord et l'amélioration des niveaux de vie dans chacun des territoires nationaux. La dimension contraignante de l'Accord porte sur

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[16] On entend par « clause sociale » les dispositions portant sur des normes minimales du travail qui sont incluses dans un traité régional ou multilatéral de libéralisation des échanges commerciaux. Par une telle clause, les États parties au traité s'engagent à respecter ces normes sous peine de la perte des avantages commerciaux découlant du traité. Pour l'état du débat sur la question, voir notamment : Robert O'BRIEN, « The Varied Paths to Minimum Global Labour Standards », dans J. HARROD et R. O'BRIEN (dir.), *Global Unions*, Londres et New-York, Routledge, 2002, p. 221.

[17] Le contenu de l'ANACT a fait l'objet de plusieurs analyses. Voir notamment : Roy ADAMS et Singh PARBUDYAL, « Workers' Rights under NAFTA: Experience with the North American Agreement on Labor Cooperation », dans BLOUIN et GILES, *op. cit.*, *supra* 177-199; Pierre VERGE, « Les dilemmes de l'ANACT; ambiguïtés ou complémentarité », (1999) 54 *Relations industrielles – Industrial Relations*, no 2, 223-244; Rodrigue BLOUIN et May MORPAW, « L'Accord nord-américain de coopération dans le domaine du travail », dans R. CHAYKOWSKI, P.-A. LAPOINTE, G. VALLÉE et A. VERMA, (dir.), *La représentation des salariés dans le contexte du libre-échange et de la déréglementation*, Actes du XXXIIIe Congrès de l'Association canadienne des relations industrielles, Québec, Dépar-tement des relations industrielles, Université Laval, 1997, p. 85-96; Emmanuelle MAZUYER, *Le traitement juridique des normes du travail dans les intégrations régionales (Communauté Européenne – ALENA)*, thèse de doctorat en droit, Florence, Institut universitaire européen, 2002; Marie-Ange MOREAU et Gilles TRUDEAU, « La clause sociale dans l'accord de libre-échange nord-américain », (1995) *Revue Internationale de Droit Économique*, no 3, 393-406; Patrick STAELENS, *Droit du travail, intégration économique et « clause sociale » à la lumière de l'expérience nord-américaine*, thèse de doctorat en droit, Saint-Etienne (France), Université Jean Monnet, 1997.

une partie seulement des droits sociaux énoncés, alors que les sanctions commerciales ne sont possibles qu'en cas de violation d'un nombre encore plus restreint de droits. Une telle caractéristique a permis de présenter l'ANACT comme une entente de coopération plutôt que comme une véritable clause sociale. Cette idée est d'ailleurs renforcée par l'absence complète d'une législation supranationale imposée aux trois pays ou de toute perspective d'harmonisation en matière sociale.

En effet, l'article 2 énonce une des caractéristiques majeures de l'ANACT en ces termes : « ... [Chaque Partie reconnaît] le droit des Parties d'établir leurs propres normes du travail ainsi que d'adopter ou de modifier en conséquence leurs lois et réglementations en matière de travail, [...]. » Chaque pays conserve donc sa pleine souveraineté quant au développement de sa législation du travail. L'Accord oblige simplement chaque pays à promouvoir l'observation de sa propre législation nationale et d'en assurer l'application efficace et transparente (articles 3 à 7 de l'ANACT). Par contre, les trois pays ont inscrit dans l'Accord l'objectif « de faire prévaloir, dans toute la mesure du possible, les principes relatifs au travail énoncés à l'Annexe 1 » (article 1(b) de l'ANACT). Ces principes visent la liberté d'association et la protection du droit d'organisation, le droit de négociation collective, le droit de grève, l'interdiction du travail forcé, la protection accordée aux enfants et aux jeunes gens en matière de travail, des normes minimales d'emploi telles un salaire minimum et la rémunération du temps supplémentaire, l'élimination de la discrimination en matière d'emploi, l'égalité de rémunération entre hommes et femmes, la prévention des accidents du travail et des maladies professionnelles, l'indemnisation en cas d'accidents du travail et de maladies professionnelles ainsi que la protection des travailleurs migrants. Il faut toutefois souligner que cet engagement demeure au niveau des objectifs et ne revêt aucun caractère contraignant.

Quant aux aspects plus contraignants, ils ne portent que sur quelques-uns des 11 principes énumérés dans l'Annexe 1 de l'Accord. Les questions de relations du travail, soit le droit d'association, le droit à la négociation collective et celui à la grève en sont exclues. De plus, les parties ont élaboré une procédure très lourde et très longue de consultation, d'enquête et d'arbitrage pour déterminer si un cas constitue une violation de l'Accord. D'éventuelles sanctions commerciales ne pourront s'appliquer que si un des trois pays a « [...] omis de façon systématique d'assurer l'application efficace de ses normes techniques du travail concernant la santé et la sécurité au travail, le travail des enfants ou le salaire minimum [...] » (article 33 (3) de l'ANACT). En fait, tout est en

place pour favoriser au maximum un règlement des litiges par voie diplomatique. Il serait d'ailleurs surprenant qu'une telle procédure mène un jour à l'imposition d'une sanction commerciale réelle.

Le Canada n'est lié à l'ANACT que pour les provinces qui ont adhéré à l'*Accord intergouvernemental canadien concernant l'Accord nord-américain de coopération dans le domaine du travail*[18]. Jusqu'à maintenant, seuls le Québec, le Manitoba, l'Alberta et l'Île du Prince Édouard ont signé l'Accord et sont formellement liés par l'ANACT.

Enfin, le Canada a conclu avec le Chili un accord qui est calqué en tous points sur l'ANACT, sauf en ce qui concerne la question des sanctions commerciales. Cet accord complète l'Accord de libre-échange intervenu entre les deux pays. Il est entré en vigueur en juin 1997.

VIII. LA RÉCEPTION ET L'IMPACT DES TRAITÉS INTERNATIONAUX EN DROIT INTERNE CANADIEN

Ce n'est pas parce que le Canada s'est juridiquement engagé à respecter toutes ces normes internationales du travail qu'elles font automatiquement partie du droit interne canadien. En effet, en vertu du droit constitutionnel canadien, un traité international conclu par le gouvernement canadien n'a pas d'application directe en droit domestique. Pour lui donner effet, le traité doit faire l'objet d'un acte de transformation ou d'incorporation, généralement une loi qui introduira ou transposera ses dispositions en droit domestique. C'est que le Canada est un État dualiste au sens strict, c'est-à-dire un État traitant les accords internationaux dans un système de droit différent de celui du droit domestique. Il en est autrement dans les États monistes : le traité international, une fois dûment conclu, devient partie intégrante du droit interne, et peut être invoqué directement devant les tribunaux domestiques[19].

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[18] Annexe 46 de l'ANACT. Voir *infra* note 28.

[19] Entre ces deux formes extrêmes interviennent toutes les nuances intermédiaires possibles. Voir John H. JACKSON, « Status of treaties in domestic legal systems: a policy analysis », (1992) 86 *The American Journal of International Law* 310. D'ailleurs le Canada présente en fait un système hybride de réception du droit international puisque, s'il est dualiste en ce qui concerne les traités, il incorpore directement le droit coutumier international dans son propre droit commun. Cette dernière règle est du moins applicable dans les provinces anglophones car elles ont toutes incorporé la *Common Law* britannique : Gibran VAN ERT, « Using Treaties in

IX. LA RÉCEPTION DES TRAITÉS INTERNATIONAUX EN DROIT INTERNE CANADIEN

Au Canada, le pouvoir de conclure un accord international est dévolu exclusivement au gouvernement fédéral. En fait, il découle de la prérogative royale et appartient formellement au gouverneur général. Le gouvernement fédéral n'a donc aucune obligation de consulter le pouvoir législatif pour être autorisé à négocier, conclure et ratifier un accord international. En d'autres termes, le Canada peut se lier à des obligations juridiques sur le plan international sans qu'une intervention législative ne soit nécessaire. Par contre, le pouvoir législatif doit intervenir si le traité conclu exige une modification du droit interne pour être mis en œuvre.

Il est intéressant de noter que ces principes, qui s'appliquaient dans tout l'Empire britannique, furent rappelés avec force à l'égard du Canada en 1935, dans une affaire où il s'agissait de mettre en œuvre les obligations internationales contractées par le gouvernement fédéral, celui-ci ayant ratifié trois conventions de l'O.I.T. (portant respectivement sur les heures de travail, le repos hebdomadaire et les mécanismes de détermination du salaire minimum). Pour rencontrer ses engagements internationaux, le gouvernement s'adressa au Parlement fédéral, qui adopta trois lois en conséquence. La validité constitutionnelle de ces lois fut contestée jusque devant le Comité judiciaire du Conseil privé à Londres. Concernant la formation d'un traité par opposition à son exécution en droit interne, lord Atkin écrivit :

> « [TRADUCTION] Il est essentiel d'avoir présente à l'esprit la distinction entre (1) la formation et (2) l'exécution des obligations qui découlent d'un traité, ce mot s'appliquant à toute entente entre deux ou plusieurs États souverains. Dans les pays constituant l'Empire britannique, il y a une règle bien établie qui veut que la conclusion d'un traité soit un acte qui relève de l'Exécutif, tandis que l'exécution de ses obligations, si elles entraînent une modification aux lois du pays, exige l'intervention du pouvoir législatif. Contrairement à ce qui a lieu ailleurs, les stipulations d'un traité dûment ratifié n'ont pas dans l'Empire, en vertu de ce traité même, force de loi. Si l'Exécutif national, le gouvernement du jour, décide d'assumer les obligations d'un traité qui entraînent des modifications aux lois existantes, il doit demander au Parlement

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Canadian Courts », dans D.M. MCRAE et A.L.C. DE MESTRAL, *The Canadian Yearbook of International Law*, vol. 38, 2000, p. 3, aux pages 4-6.

> son assentiment, toujours aléatoire, aux modifications proposées. Afin d'être sûr de ce consentement, il s'efforcera très souvent d'obtenir, avant la ratification finale, l'approbation expresse du Parlement. Mais on n'a jamais soutenu, et la loi n'est pas à cet effet, que pareille approbation a force de loi ou qu'en droit elle empêche le Parlement du jour, ou son successeur, de refuser sa sanction à toute mesure législative proposée dont il pourra plus tard être saisi. Sans aucun doute le Parlement, comme le fait remarquer le juge en chef, possède un contrôle constitutionnel sur l'Exécutif; mais il est indiscutablement du ressort de l'Exécutif de créer des obligations stipulées dans les traités et de les sanctionner quant au fond et à la forme[20]. »

Cette attitude dualiste se retrouve dans les décisions judiciaires canadiennes contemporaines. Par exemple, parce que le *Pacte sur les droits civils et politiques* n'a pas été incorporé en droit interne, la Cour supérieure du Québec a refusé de se saisir de celui-ci afin de déclarer inopérantes certaines dispositions de la *Charte de la langue française* et de la *Charte des droits et libertés de la personne*[21]. D'une façon identique, la même juridiction a conclu que l'ALÉNA ne peut donner ouverture à un recours direct devant les tribunaux nationaux en cas de violations de certaines de ses dispositions[22].

Il est donc bien clair qu'aucune disposition d'un acte international auquel le Canada est partie, dans le domaine du travail comme en d'autres, ne peut créer d'obligations pour les individus et fonder un recours direct devant les tribunaux domestiques, à moins qu'il n'ait été incorporé explicitement dans une loi par l'autorité législative compétente[23]. Dans

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[20] *Attorney-General for Canada* c. *Attorney-General for Ontario*, [1937] A.C. 326, 347 et 348. La traduction française du passage cité provient de la décision de la Cour suprême du Canada dans l'affaire *Opération Dismantle Inc.* c. *La Reine*, [1985] 1 R.C.S. 441, dans laquelle le passage de la décision du Conseil privé est reproduit avec approbation (à la p. 484).

[21] *Les Immeubles Claude Dupont Inc.* c. *Procureur général du Québec*, [1994] R.J.Q. 1968. Dans cette affaire, le Comité des droits de l'Homme de l'ONU avait déclaré que les dispositions de la *Charte de la langue française* en matière d'affichage commerciale violaient la liberté d'expression garantie par le pacte.

[22] *Les Entreprises de rebuts Sanipan* c. *Procureur général du Québec*, [1995] R.J.Q. 821.

[23] C. EMANUELLI, *op. cit.*, note 9, p. 89 et suiv.; Sylvie SCHERRER, « L'effet des traités dans l'ordre juridique interne canadien à la lumière de la jurisprudence récente », dans Service de la formation permanente, Barreau du Québec, *Développements récents en droit administratif*, Cowansville, Éditions Yvon Blais, 2000, p. 57.

l'arène judiciaire, les accords internationaux eux-mêmes sont en conséquence d'une utilité fort réduite, pouvant à l'occasion servir comme outil d'interprétation des lois qui auraient été adoptées pour les mettre en œuvre sur le plan domestique. La question est discutée en détail plus bas. Il faut par contre souligner dès maintenant que l'ANACT pourrait jusqu'à un certain point contourner cette conséquence de l'approche dualiste prévalant au Canada, puisque son essence même est l'engagement, par chacun des trois États partenaires, de respecter et d'appliquer sa propre législation interne du travail, sans référence à des dispositions substantives supranationales.

Au Canada, la procédure d'exécution des traités internationaux est compliquée par la distribution des pouvoirs législatifs entre les niveaux fédéral et provincial au sein de la fédération. La décision du Conseil privé mentionnée plus haut[24] constitue le précédent en la matière : la loi de mise en œuvre d'un traité international relève de l'autorité législative qui a compétence sur le sujet faisant l'objet du traité. Même si cette décision est aujourd'hui remise en cause par certains[25], elle représente toujours la règle applicable. Ceci expliquerait d'ailleurs l'attitude fort prudente du gouvernement fédéral à l'égard de la ratification des conventions de l'O.I.T.[26]. La plupart d'entre elles relèvent de l'autorité exclusive des provinces quant à leur mise en œuvre[27].

Lorsque le traité que le gouvernement canadien envisage de ratifier contient une clause à cet effet, l'État fédéral canadien ne s'engagera pour des matières provinciales qu'à l'égard des provinces qui auront été identifiées nommément et formellement par le gouvernement fédéral aux autres États parties au traité. C'est une clause de cette nature qu'on trouve à l'Annexe 46 de l'ANACT, par laquelle le Canada s'engage à lister « […] dans une déclaration toutes provinces pour lesquelles il devra être lié

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24 *Attorney-General for Canada* c. *Attorney-General for Ontario*, précité, note 20.

25 Voir notamment Robert HOWSE dans « Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration », (1998/99) 22 *Maryland Journal of International Law and Trade*, N° 2, 185, 264 à 268; VAN ERT, *loc. cit*., note 19, aux p. 67 à 79.

26 Voir LANGILLE, *loc. cit*., note 7, 13-17.

27 Le précédent judiciaire à cet égard est la décision du Conseil privé dans *Toronto Electric Commissioners* c. *Snider*, [1925] A.C. 396.

sur les questions relevant de leur compétence »[28]. Par contre, lorsqu'une telle clause n'est pas incluse dans le traité à signer, le Canada sera très prudent avant de s'engager à modifier un droit qui relève exclusivement du pouvoir des provinces. Ainsi, dans le cas des conventions de l'O.I.T. – celles-ci ne contiennent pas une clause particulière pour les États fédéraux –, le Canada a toujours attendu l'accord unanime des provinces avant de les ratifier[29].

X. LE STATUT ET LE RÔLE DES INSTRUMENTS INTERNATIONAUX DU TRAVAIL DEVANT LES TRIBUNAUX DOMESTIQUES CANADIENS

Les règles constitutionnelles décrites plus haut expliquent pourquoi les dispositions d'un traité international auquel le Canada est partie ne sont pas incluses directement à l'intérieur du droit domestique. Il faut un acte d'introduction, généralement une loi, pour ce faire. Dès lors, en droit domestique, les tribunaux n'appliquent pas les dispositions du traité, mais plutôt celles de la loi introductive. Celle-ci pourra reprendre textuellement les dispositions du traité, en y faisant une référence directe par exemple, ou s'en inspirer dans le droit substantif qu'elle définit. Ce faisant, toutefois, la loi introductive peut s'écarter, plus ou moins significativement, des dispositions du traité qu'elle met en œuvre[30]. Dans ce contexte, le contenu du traité demeure-t-il pertinent?

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[28] ANACT, Annexe 46, art. 1. Le Canada doit aussi notifier aux autres États parties les modifications apportées à sa déclaration. Jusqu'à maintenant, cette déclaration identifie les provinces suivantes : Québec, Manitoba, Alberta et Île du Prince Édouard. Le Canada s'engage de plus à l'article 7 de l'Annexe à s'efforcer « […] de rendre [l'Accord] applicable au plus grand nombre de provinces possible ». L'Annexe 46 établit enfin tout un système pour identifier quand et à l'égard de quelles provinces canadiennes une plainte pourra être formulée à partir de l'accord, de même qu'au nom de quelles provinces le Canada pourra lui-même formuler une plainte à l'endroit de l'un ou l'autre des deux autres États partenaires.

[29] Voir Ton ZUIJDWIJK dans « Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration », (1998/99) 22 *Maryland Journal of International Law and Trade*, n° 2, 185, aux p. 259 à 263.

[30] C. EMANUELLI, *op. cit.*, note 9, p. 89.

La jurisprudence est unanime sur le point suivant : lorsque la loi qui met en œuvre un traité international en droit interne est en soi ambiguë, le juge peut recourir aux dispositions du traité pour l'interpréter et ainsi clarifier l'ambiguïté. De plus, le juge doit s'efforcer de résoudre l'ambiguïté de façon compatible avec les dispositions de la convention internationale pertinente. La jurisprudence récente de la Cour suprême du Canada admet même que le recours à la convention internationale est possible pour interpréter les dispositions de la loi introductive sans pour autant que celles-ci ne soient intrinsèquement ambiguës[31].

Par ailleurs, le recours à la norme internationale est possible même lorsque celle-ci n'est pas incorporée explicitement dans la loi à interpréter[32]. En effet, de façon générale, il faut interpréter le droit domestique à la faveur des obligations internationales du Canada, car il est présumé que le législateur n'entend pas légiférer de façon incompatible avec celles-ci. Il s'agit là d'une présomption inhérente au droit commun applicable au Canada, une présomption qui permet à la magistrature de conférer un rôle actif, même si indirect, au droit international dans le développement du droit domestique[33]. Traditionnellement, deux conditions sont nécessaires pour donner ouverture à cette présomption : un texte de droit interne ambigu et des indices suggérant que le législateur entendait appliquer la norme internationale. La jurisprudence récente de la Cour suprême marque toutefois une certaine évolution à l'égard de ces conditions, et l'application que la Cour en a faite dernièrement permet d'entrevoir un recours plus ouvert aux dispositions du droit international[34]. En ce qui concerne les conditions de travail et les relations industrielles, c'est cette présomption qui permettra au droit international de pénétrer le droit domestique, car il est très rare que les lois canadiennes en ce domaine n'incorporent explicitement les conventions internationales ratifiées par le Canada.

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31 Voir notamment *National Corn Growers Association* c. *Canada*, [1990] 2 R.C.S. 1324; C. EMANUELLI, *id.*, p. 94.

32 Voir SCHERRER, *loc. cit.*, note 23, à la page 72 et suiv.

33 Sur ce point, voir généralement VAN ERT, *loc. cit.*, note 19, aux pages 28-43.

34 Cette évolution, encore hésitante, soulève plusieurs questions fondamentales, notamment sur le rôle du pouvoir exécutif et sur celui de la magistrature dans le régime constitutionnel canadien. Ces questions font l'objet du texte que présente la professeure France Houle à ce congrès. Voir France HOULE, « La réception du droit international des droits de la personne en droit interne canadien : de la théorie de la séparation des pouvoirs vers une approche fondée sur le droits fondamentaux ».

Une revue des décisions pertinentes récentes de la Cour suprême du Canada révèle toutefois des résultats mitigés quant au recours aux dispositions du droit international du travail pour interpréter le droit domestique du travail. Dans tous les cas, il s'agissait de dispositions législatives, fédérales ou provinciales, contestées à partir de la *Charte canadienne des droits et libertés*[35]. Celle-ci, qui ne s'applique qu'à l'action gouvernementale, garantit notamment la liberté d'association : l'État ne pourra la restreindre que dans les limites de ce qui est raisonnable dans une société libre et démocratique[36]. Il n'est dès lors pas surprenant qu'on ait invoqué les obligations internationales du Canada pour influer sur le contrôle judiciaire fait de certaines lois domestiques en matière de travail à partir de la Charte canadienne. Par ailleurs, l'évolution à l'égard du recours aux dispositions du droit international évoquée au paragraphe précédent semble avoir marqué les plus récentes décisions de la Cour en ce domaine.

La première décision à considérer, et certes la plus importante, est celle rendue en 1987 dans l'affaire *Re Public Service Employee Relations Act (Alberta)*[37]. Il s'agissait de trois lois albertaines qui interdisaient la grève et imposaient l'arbitrage obligatoire pour dénouer les impasses survenant dans la négociation collective des conditions de travail des salariés du secteur public de la province. Ces lois étaient contestées au motif qu'elles violaient la liberté d'association garantie par la Charte canadienne. La décision de la Cour suprême fut partagée, les juges majoritaires concluant que les droits de négocier collectivement les conditions de travail et de faire grève n'étaient pas inclus dans la liberté d'association. Aucun des juges majoritaires ne référa aux instruments internationaux pertinents en la matière qu'aurait ratifiés le Canada. Ils adoptèrent une définition restrictive de la liberté d'association, précisant que celle-ci ne s'étend qu'aux droits qu'une personne détient individuellement. En d'autres termes, l'activité de l'association n'est pas constitutionnellement protégée lorsque cette activité ne peut être aussi exercée individuellement. Il faut insister sur le fait que tous les juges majoritaires soulignèrent que ni la négociation collective des conditions de

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[35] La Charte fait partie de la *Loi constitutionnelle de 1982*. Celle-ci est contenue à l'Annexe B de la *Loi de 1982 sur le Canada*, R.U. 1982, c. 11 et est codifiée dans L.R.C., app II, n° 44, Annexe B, Partie I. Pour une analyse exhaustive de la jurisprudence canadienne sur cette question, voir SCHABAS, *op. cit.*, note 9.

[36] Art. 2(d) (liberté d'association) et 1 (limites raisonnables) de la Charte.

[37] [1987] 1 R.C.S. 313.

travail ni la grève n'étaient des droits fondamentaux au Canada. Parlant du droit de grève, le juge McIntyre écrivit :

On ne peut dire qu'il soit devenu à ce point partie intégrante de nos traditions sociales et historiques au point d'acquérir le statut d'un droit immuable et fondamental, fermement enraciné dans nos traditions et dans notre philosophie politique et sociale. Il n'existe donc aucun motif, comme on le propose dans la quatrième conception de la liberté d'association, de présumer l'existence d'un droit de grève constitutionnel.[38]

Dans cette affaire, le juge en chef Dickson, auquel s'associa la juge Wilson, inscrivit une forte dissidence dans laquelle il étudie longuement le contenu du droit international quant à la liberté d'association. Voici dans quels termes il y décrit le rôle du droit international dans l'interprétation de la Charte canadienne :

> « Le droit international nous donne un bon aperçu de la nature et de la portée de la liberté d'association des travailleurs. Depuis la fin de la Deuxième Guerre mondiale, la protection des droits et libertés fondamentaux collectifs et individuels est devenue une question d'intérêt international. Il existe maintenant un droit international des droits de la personne constitué d'un ensemble de traités (ou conventions) et de règles coutumières, en vertu duquel les nations du monde se sont engagées à adhérer aux normes et aux principes nécessaires pour assurer la liberté, la dignité et la justice sociale à leurs ressortissants. La *Charte* est conforme à l'esprit de ce mouvement international contemporain des droits de la personne et elle comporte un bon nombre des principes généraux et prescriptions des divers instruments internationaux concernant les droits de la personne. Les diverses sources du droit international des droits de la personne – les déclarations, les pactes, les conventions, les décisions judiciaires et quasi judiciaires des tribunaux internationaux, et les règles coutumières – doivent, à mon avis, être considérées comme des sources pertinentes et persuasives quand il s'agit d'interpréter des dispositions de la *Charte*. […]

[38] *Id*., 413.

> En outre, le Canada est partie à plusieurs conventions internationales sur les droits de la personne qui comportent des dispositions analogues ou identiques à celles de la *Charte*. Le Canada s'est donc obligé internationalement à assurer à l'intérieur de ses frontières la protection de certains droits et libertés fonda-mentaux qui figurent aussi dans la *Charte*. Les principes généraux d'interprétation constitutionnelle requièrent que ces obligations internationales soient considérées comme un facteur pertinent et persuasif quand il s'agit d'interpréter la *Charte*. […] Je crois qu'il faut présumer, en général, que la *Charte* accorde une protection à tout le moins aussi grande que celle qu'offrent les dispositions similaires des instruments internationaux que le Canada a ratifiés en matière de droits de la personne.[39] »

Par la suite, le juge Dickson passe en revue les divers instruments ratifiés par le Canada et qui traitent de la liberté d'association : le *Pacte international relatif aux droits économiques, sociaux et culturels*, le *Pacte international relatif aux droits civils et politiques* et la *Convention sur la liberté syndicale et la protection du droit syndical, 1948* (N° C-87) de l'O.I.T. En reconnaissant le droit d'association, ces instruments protègent également les activités essentielles des syndicats. À l'égard de la Convention n° 87 en particulier, le juge Dickson note que les organes décisionnels de l'O.I.T. considèrent que la liberté de former et d'organiser des syndicats inclut celles de négocier collectivement des conditions de travail et de faire grève. Il souligne aussi le fait que le Comité de la liberté syndicale et le Conseil d'administration de l'O.I.T. aient étudié un certain nombre de plaintes formulées contre le Canada par des syndicats canadiens à partir de la Convention n° 87. Certaines de celles-ci contestaient les dispositions des mêmes trois lois de l'Alberta qui étaient l'objet du pourvoi devant la Cour suprême. Or, les instances de l'O.I.T. avaient condamné unanimement le Canada, en ce que les prohibitions du droit de grève contenues dans ces lois étaient beaucoup trop larges, de telles prohibitions ne devant s'appliquer qu'aux employés exerçant vraiment des services essentiels.

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[39] *Id*., 348 et 349. Selon SCHABAS, même s'il s'agit d'une dissidence, cette opinion du juge Dickson n'a jamais été remise en question depuis et constitue aujourd'hui l'état du droit sur la question. Voir SCHABAS, *op. cit.*, note 9, p. 35.

La décision de la Cour suprême de 1987 a fait jurisprudence. En 1990, la Cour rendait une autre décision dans laquelle elle réitérait ses conclusions antérieures quant à la liberté d'association[40]. La Cour suprême jugeait encore en 1999 que la liberté d'association reconnue par la Charte canadienne n'obligeait pas le législateur à doter un groupe donné de travailleurs d'un régime syndical particulier ou à lui permettre de former un type particulier d'association défini lui-même par une loi particulière[41]. Dès lors, l'exclusion des membres de la Gendarmerie Royale du Canada du régime du *Code canadien du travail*[42] et de la *Loi sur les relations de travail dans la fonction publique*[43] n'enfreint pas la Charte canadienne. Les juges majoritaires ont rendu cette décision sans référence aucune aux instruments internationaux ratifiés par le Canada. Seuls les deux juges minoritaires, les juges Cory et Iacobucci, l'ont fait. Pour eux, l'objet même de la loi, qui était d'empêcher les membres de la G.R.C. de former une association d'employés, constituait une violation flagrante de la liberté d'association garantie par l'article 2(d) de la Charte. Au soutien de leur raisonnement, ils ont invoqué divers instruments internationaux ratifiés par le Canada[44] qui reconnaissent tous « …la liberté fondamentale des employés de s'associer pour défendre leurs intérêts à titre d'employés »[45]. Les deux juges ont toutefois précisé qu'il n'était pas nécessaire de discuter de l'interaction entre la liberté d'association de l'article 2(d) de la Charte et le droit à la négociation collective pour décider de l'affaire.

Cette jurisprudence sur la liberté d'association a subi une évolution certaine tout récemment, lorsque la Cour suprême a dû se pencher sur la validité constitutionnelle de l'exclusion des travailleurs agricoles de la Loi sur les relations de travail de l'Ontario[46]. Cette exclusion empêchait dans les faits ces travailleurs particulièrement vulnérables de bénéficier de la

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40 *L'Institut professionnel de la fonction publique du Canada* c. *Le commissaire des Territoires du Nord-Ouest et la Northwest Territories Public Service Association*, [1990] 2 R.C.S. 367.

41 *Gaétan Delisle* c. *Le procureur du Canada*, [1999] 2 R.C.S. 989.

42 L.R.C. (1985), c. L-2.

43 L.R.C. (1985), c. P-35.

44 Notamment, la *Déclaration universelle des droits de l'homme*, le *Pacte international relatif aux droits économiques, sociaux et culturels*, le *Pacte international relatif aux droits civils et politiques* et la *Convention sur la liberté syndicale et la protection du droit syndical*, 1948 (N° C-87) de l'O.I.T.

45 Affaire *Delisle*, précitée, note 41, 1039.

46 *Dunmore* c. *Ontario (Procureur général)*, [2001] 3 R.C.S. 1016.

protection de la loi pour former un syndicat, et négocier collectivement leurs conditions de travail. La Cour a cette fois jugé que la reconnaissance de la liberté d'association exigeait dans certains cas que le législateur mette en place un mécanisme spécifique pour en promouvoir l'exercice effectif. Dans cette affaire, on avait en effet réussi à démontrer que les travailleurs agricoles étaient incapables d'exercer leur droit constitutionnel de s'associer sans la protection de la loi. Dans ses motifs, la Cour suprême affirma que sa décision était conforme au droit international de la personne. Elle référa non seulement à la Convention n° 87 de l'O.I.T., ratifiée par le Canada, mais aussi à une autre, la Convention sur le droit d'association (Agriculture) (N° 11), qui n'était pourtant pas ratifiée. Ces instruments constituaient à ses yeux un fondement normatif pour l'interdiction de toute forme de discrimination dans la protection de la liberté syndicale. La Cour n'a toutefois pas jugé bon revenir sur ses décisions passées et inclure le droit à la négociation collective et à la grève dans la liberté d'association, comme les instruments internationaux ratifiés par le Canada le prescrivaient. Elle s'est limitée à statuer que certaines catégories de travailleurs devaient bénéficier de la protection de la loi pour exercer effectivement leur droit de former un syndicat et contrer les pratiques patronales déloyales.

Les instruments internationaux ratifiés par le Canada ont par ailleurs orienté la lecture que certains membres de la Cour suprême ont faite de la notion de liberté comprise dans l'article 7 de la *Charte canadienne*[47]. Dans l'affaire *Michèle Godbout* c. *La Ville de Longueuil*[48], il s'agissait de déterminer si l'obligation de résider dans les limites de la Ville pour y détenir un emploi de fonctionnaire enfreignait le droit à la liberté garanti par l'article 7. Trois des sept juges formant le banc dans cette affaire ont décidé d'inclure dans ce droit celui de choisir son lieu de résidence[49]. Pour eux, le fait que le Canada ait ratifié le *Pacte international relatif aux droits civils et politiques*, un instrument qui protège expressément le droit de choisir un lieu pour établir sa demeure (article 12 du Pacte) « étaye cette opinion ». Au nom de ces magistrats, le juge La Forêt ajoute :

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47 L'article 7 de la *Charte canadienne* se lit ainsi : « Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. »

48 [1997] 3 R.C.S. 844.

49 Les quatre autres juges ont plutôt estimé qu'il n'était point nécessaire de se prononcer sur cette question.

> « Comme notre Cour a reconnu la valeur de persuasion des pactes internationaux dans la définition de la portée des droits garantis par la Charte [références à l'Arrêt *Slaight Communications* (*infra*) et à l'affaire *Re Public Service Employee Relations Act (Alberta)* (*supra*)], je considère que l'article 12 renforce ma conclusion voulant que le droit de décider où établir sa demeure fasse partie de la sphère irréductible d'autonomie personnelle protégée par la garantie de liberté énoncée à l'article 7.[50] »

Ce passage du juge La Forêt renvoie à une autre décision de la Cour suprême du Canada[51] qui, dès 1989, ouvrait une perspective intéressante pour l'utilisation des instruments internationaux en droit domestique canadien. Cette fois, il s'agissait d'appliquer le test de l'article 1 de la *Charte canadienne* à l'ordonnance d'un tribunal administratif qui limitait la liberté d'expression de l'employeur visé. Un arbitre nommé par le gouvernement fédéral sous l'article 61.5 du *Code canadien du travail*[52] avait conclu au caractère injuste du congédiement imposé au salarié. Parmi les mesures de réparation ordonnées à la suite de cette conclusion, l'employeur devait rédiger une lettre de référence indiquant certaines données objectives concernant l'emploi du salarié congédié. La Cour suprême décida que cette mesure de réparation enfreignait la liberté d'expression de l'employeur telle que garantie par la *Charte canadienne*. La Cour décida toutefois que la mesure demeurait acceptable dans le cadre de l'article 1 de la Charte qui reconnaît qu'une liberté garantie peut être restreinte « …dans les limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique ». Pour ce faire, la Cour dut considérer l'objectif poursuivi par la mesure qui était contestée. Les juges majoritaires, s'exprimant cette fois sous la plume du juge en chef Dickson, référèrent aux instruments internationaux ratifiés par le Canada pour en juger l'importance. La citation suivante, tirée de la décision majoritaire, est explicite à cet égard :

> « Étant donné la double fonction de l'article premier que l'on a identifiée dans l'arrêt *Oakes*, les obligations internationales du Canada en matière de droits de la personne devraient renseigner

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[50] Précitée, note 48, 895.

[51] *Slaight Communications Inc.* c. *Davidson*, [1989] 1 R.C.S. 1038.

[52] A l'époque : S.R.C. 1970, c. L-1. Aujourd'hui, il s'agit de l'article 240 du *Code canadien du travail*, L.R.C. (1985), c. L-2.

> non seulement sur l'interprétation du contenu des droits garantis par la Charte, mais aussi sur l'interprétation de ce qui peut constituer des objectifs urgents et réels au sens de l'article premier qui peuvent justifier la restriction de ces droits. De plus, aux fins de cette étape de l'examen de la proportionnalité, le fait qu'une valeur ait le statut d'un droit de la personne international, soit selon le droit international coutumier, soit en vertu d'un traité auquel le Canada est un État partie, devrait en général dénoter un degré élevé d'importance attaché à cet objectif. Cela est en accord avec l'importance que la Cour attribue à la protection des employés en tant que groupe vulnérable dans la société.[53] »

Pour atteindre cette dernière conclusion, la Cour avait invoqué la ratification par le Canada du *Pacte international relatif aux droits économiques, sociaux et culturels*. Considérant cet instrument, les juges majoritaires affirmèrent ne pas douter de la très grande importance pour le Canada de l'objectif de protéger le droit de travailler sous ses différents aspects et d'assurer la dignité du travailleur. La Cour suprême dans l'affaire *Keegstra*[54] a de nouveau confirmé la grande importance à accorder aux instruments internationaux ratifiés par le Canada lorsqu'il s'agit, dans le cadre de l'article 1 de la *Charte canadienne*, d'apprécier l'importance de l'objectif poursuivi par le législateur en adoptant la loi contestée.

Un développement significatif est survenu en 1999 dans la jurisprudence de la Cour suprême alors que celle-ci a rendu dans l'affaire Baker[55], une décision qui donnera certainement une nouvelle visibilité aux instruments internationaux dans le droit domestique canadien[56]. Même si les faits de la cause ne portent pas sur une question liée au travail, il est évident que l'arrêt aura un impact en droit du travail interne. Dans cette affaire, la Cour devait définir les critères applicables au contrôle judiciaire d'une décision de nature discrétionnaire rendue par le ministre canadien de l'Emploi et de l'Immigration. Celui-ci (ou son représentant) peut, en vertu de la *Loi sur l'immigration* et de la réglementation applicable,

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53 *Slaight Communications Inc.*, précité, note 51, 1056 et 1057.

54 *La Reine* c. *Keegstra*, [1990] 3 R.C.S. 697.

55 *Baker* c. *Le ministre de la Citoyenneté et de l'Immigration*, [1999] 2 R.C.S. 817.

56 Consulter à cet égard : Gerald P. HECKMAN, « Unfinished Business: *Baker* and the Constitutionality of the Leave and Certification Requirements under the *Immigration Act* », (2002) 27 *Queen's Law Journal* 683.

faciliter l'admission au Canada d'une personne pour des raisons humanitaires. La Cour, dans son opinion majoritaire, pose le principe suivant : « […] il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la Charte »[57]. Appliquant ce principe, et considérant notamment les valeurs fondamentales de la société canadienne, les juges majoritaires ont conclu que, dans une telle décision discrétionnaire d'ordre humanitaire, le ministre devait porter une attention particulière aux besoins et aux intérêts des enfants. Pour la Cour, les instruments internationaux ratifiés par le Canada, bien que ne faisant pas partie en tant que tels du droit canadien, devaient constituer une considération importante dans la détermination des valeurs de la société canadienne. Le rôle névralgique des instruments internationaux dans leur décision ressort des propos suivants :

Un autre indice de l'importance de tenir compte de l'intérêt des enfants dans une décision d'ordre humanitaire est la ratification par le Canada de la Convention relative aux droits des enfants et la reconnaissance de l'importance des droits des enfants et de l'intérêt supérieur des enfants dans d'autres instruments internationaux ratifiés par le Canada.[58]

A l'aide des instruments internationaux ratifiés par le Canada, la Cour suprême en arrive à décider qu'une décision de nature discrétionnaire d'un ministre est déraisonnable parce que contraire à la tradition humanitaire canadienne. C'est conférer là un rôle fort important à des instruments internationaux non incorporés en droit interne : ils contribuent à baliser l'exercice d'un pouvoir discrétionnaire conféré par la loi à un ministre du gouvernement. L'importance de cet avancé se mesure par les propos lapidaires suivants exprimés par le juge Iacobucci dans sa courte dissidence :

> « […] le résultat sera que l'appelante pourra parvenir indirectement à ce qu'elle ne peut faire directement, c'est-à-dire donner effet dans le système juridique interne à des obligations internationales assumées par le pouvoir exécutif seul et qui n'ont pas encore été soumises à la volonté démocratique du Parlement.[59] »

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[57] *Baker*, précité, note 55, 855.

[58] *Id*., 860 et 861.

[59] *Id*., 866.

Ce survol de la jurisprudence de la Cour suprême du Canada démontre que si les instruments internationaux ratifiés par le Canada en matière de travail ont été invoqués à l'occasion, leur impact dans les décisions de la Cour a été fort mitigé jusqu'à maintenant. Ainsi, les obligations internationales du Canada n'ont pas amené la Cour à lire le droit de négociation collective et le droit de grève dans la notion de liberté d'association, du moins lorsqu'ils agissaient comme interprète de la Charte canadienne. Il demeure que la Cour suprême a récemment émis des signaux selon lesquels elle est prête à donner une plus grande importance aux instruments internationaux ratifiés par le Canada dans l'interprétation du droit interne canadien. Ses décisions dans les affaires Dunmore et Baker sont explicites à cet égard.

CONCLUSION

Même si le Canada a été timide dans la ratification des normes internationales du travail existantes, il demeure que les obligations qu'il a contractées au plan international forment un corpus juridique imposant. Au-delà du rôle persuasif qu'il peut jouer dans l'arène politique, cet ensemble de règles et de principes n'a malheureusement pas eu un impact déterminant dans l'interprétation et l'application que font les tribunaux domestiques de la législation canadienne du travail. Les risques que fait peser la mondialisation de l'économie sur le droit du travail interne, de même que le rôle essentiel que le droit international doit jouer dans ce contexte, exigent une remise en cause des principes de réception du droit international en droit canadien.

Il faut rappeler que le droit international du travail a évolué récemment, favorisant certainement de la sorte une meilleure réception de ses prescriptions en droit interne. L'ANACT, par exemple, est un instrument continental, plus décentralisé et plus proche de la réalité canadienne, que les conventions de l'O.I.T. De plus, au lieu d'établir de nouvelles normes supranationales, étrangères au droit domestique, l'ANACT insiste simplement sur la mise en œuvre transparente et rigoureuse du droit interne canadien. Par ailleurs, la reconnaissance du caractère fondamental, universel et inaliénable de certaines normes du travail au plan international apparaît aussi une avancée considérable. Ainsi, en 1998, l'O.I.T. a élevé au rang de droits fondamentaux quatre principes contenus dans huit conventions, dont celui de la liberté d'association et du droit à la négociation collective. Ces principes lient tous les États membres de l'O.I.T., qu'ils aient ou non ratifié les huit

conventions en question. En dépit de la conception dualiste prévalant au Canada, ces principes devraient recevoir un écho particulier en droit interne, et s'imposer aux tribunaux comme une référence incontournable. C'est ainsi qu'il serait certainement plus difficile aujourd'hui à la Cour suprême du Canada de soutenir, comme elle l'a fait en 1987, que le droit à la grève n'a pas encore atteint le statut de droit fondamental au Canada.

L'impact fort discret des normes internationales sur le contenu et l'évolution du droit canadien du travail s'explique en grande partie par la structure constitutionnelle canadienne. Celle-ci rend particulièrement difficile la mise en œuvre des engagements internationaux contractés par Ottawa en droit interne. Elle limite aussi certainement le nombre de ratifications que le gouvernement fédéral est prêt à concrétiser.

Il n'appartient pas aux tribunaux de modifier la constitution canadienne et le partage des compétences législatives au sein de la fédération. Reste que le principe établi par le Conseil privé en 1937, selon lequel seule l'autorité législative compétente sur l'objet du traité peut adopter une loi de mise en œuvre d'un traité international, limite la marge de manœuvre canadienne à l'égard de la ratification de traités internationaux, et affecte la crédibilité du Canada sur la scène internationale. Il est grandement temps que l'opportunité de ce principe soit remise en question parce que son application mène à des résultats aberrants. Par exemple, comment le Canada peut-il, d'une façon crédible et convaincante, exiger l'insertion d'une clause sociale dans un éventuel accord sur la Zone de libre-échange des Amériques (ZLEA) qui est actuellement en négociation, alors que l'ANACT ne s'applique toujours pas à la Nouvelle–Écosse, au Nouveau-Brunswick, à Terre-Neuve, à la Saskatchewan et à la Colombie-Britannique?

La solution à cet égard est difficile à imaginer, et il est loin d'être évident qu'elle doit relever de l'initiative des tribunaux. Il n'est pas réaliste d'envisager une centralisation des pouvoirs législatifs liés au travail dans la conjoncture politique qui prévaut actuellement au Canada. Certains croiront tout de même que l'initiative appartient ici au gouvernement fédéral qui devra soit rechercher plus activement la coopération et l'adhésion des provinces, soit oser agir unilatéralement, particulièrement lorsque des droits fondamentaux de la personne sont en cause. A l'inverse, est-il imaginable de doter les provinces d'une véritable personnalité internationale relativement à des matières qui relèvent de leur compétence législative exclusive?

Malgré l'approche dualiste prévalant au Canada, la jurisprudence de la Cour suprême démontre que le contenu du droit international auquel le Canada est lié peut avoir un impact significatif en droit interne. Il est à espérer que la tendance amorcée par la Cour suprême, grâce à laquelle le droit international reçoit une plus grande visibilité, se poursuive et s'affermisse. Les droits fondamentaux du travail, aujourd'hui objet d'un vaste consensus international, ne peuvent demeurer dans l'antichambre du droit domestique canadien. Les instruments internationaux, surtout ceux établissant des droits fondamentaux de la personne, devraient tous avoir un caractère persuasif dans l'application et l'interprétation du droit interne canadien. En effet, comment justifier un écart du droit canadien à la norme internationale lorsque celle-ci fait l'objet d'un vaste consensus au plan international? Les traités ratifiés par le Canada devraient recevoir une considération supplémentaire, compte tenu de l'engagement juridique dont ils sont l'objet en droit international. À une époque où le droit international doit réussir à s'imposer davantage, il n'est pas acceptable que l'acte d'engagement du Canada auprès de la communauté internationale n'ait aucun écho particulier en droit interne. Il faut en arriver à conférer une signification déterminante à la ratification d'un instrument juridique international en droit interne. Toute évolution significative à cet égard exige une remise en cause de l'équilibre et de la séparation des pouvoirs entre les différentes branches de l'État. Comme les possibilités qu'une telle remise en cause ne survienne rapidement apparaissent très minces, il faut souhaiter qu'entre-temps, les juges osent incorporer davantage les instruments internationaux ratifiés par le Canada dans la lecture qu'ils font de la législation canadienne.

Un tel mouvement a été amorcé principalement grâce à l'entrée en vigueur de la *Charte canadienne des droits et libertés*. La jurisprudence y a vu la consécration en droit canadien de plusieurs droits fondamentaux de la personne reconnus en droit international. Cela a permis à l'occasion de lire le contenu de la Charte à la lumière du droit international. Il faut espérer que les juges n'hésitent pas à faire de même à l'égard de la législation ordinaire. C'est particulièrement important dans le domaine du travail puisque c'est la législation ordinaire, généralement provinciale, qui met en œuvre les prescriptions du droit international ratifié par le Canada. Le droit canadien a récemment laissé entrevoir une certaine ouverture à une telle tendance. Pour qu'elle se concrétise, il est impératif que les membres de la magistrature et les plaideurs soient sensibilisés au rôle et au contenu du droit international. Par leur action, ils peuvent contribuer à faire en sorte que le contenu du droit canadien du travail soit davantage

conforme aux obligations internationales qui lient le Canada. Ce faisant, ils contribuent aussi à protéger les travailleurs canadiens contre certains des effets négatifs de la mondialisation de l'économie sur leurs conditions de travail et leur protection sociale.

Cross-Border Insolvencies
Challenges of Litigation in a Global Economy

James M. FARLEY*

Insolvency is a condition which is inherently chaotic. With the effluxion of time and no stabilization of distracting factors, value evaporates. Resources are not fully utilized—indeed in some instances, the scarce resources are completely discarded. Often these resources are intangibles—namely the goodwill which is built up in a business organization and its workforce. This is not the goodwill that enhances the value of a business by its location, say a newsstand in a subway station. Rather it is the goodwill which a business has arising out of a trained workforce, with established ties to suppliers and to customers and with an organized distribution system. Time, experience and capital have been spent in building up such an organization. While this organization has become insolvent, and therefore there will have been a combination of internal and external factors contributing to this condition, it would be a waste to have the business shut down and its tangible assets liquidated on a piecemeal basis. That result would not maximize value for the creditors of the company (nor for its shareholders); it would throw its employees out of work requiring them to seek jobs for which they may not be readily qualified; it would require anyone purchasing piecemeal assets to rebuild the goodwill discussed.

There is now general recognition that the sale (or other reorganization disposition) of an insolvent but viable business is the option which should be first explored so as to conserve the scarce resources. That may take the form of compromise of debt (restructuring the balance sheet) with creditors exchanging part of the money owed to them into equity, possibly with existing management continuing and possibly with the original shareholders maintaining a (reduced) equity participation. At the other end

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of the spectrum, the company may be taken over by a new equity investor who will require new management and the original creditors may have sold their debt position to entrepreneurial "vulture funds", the managers of which may be counting on a reorganization plan leaving them with a return of more pennies on the dollar than they paid the original creditors, with or without an equity kicker. Existing management may survive if it is perceived that the troubles which beset the enterprise were unexpected by the industry generally; if, however, existing management were not alert, then their chances of survival are minimized.

If productivity is a fundamental problem, then a balance sheet restructuring will only be a temporary band-aid doomed to failure. Productivity issues require a complete rethinking of the business organization/operation so that the restructured enterprise may be competitive. There must also be a recognition that the "successful restructuring" of an enterprise may only increase the pressure on its domestic competitors which may then find themselves next in line for insolvency proceedings. That is, there may be overcapacity in an industry sector which cries out for reduction rationalization. The equation may be more difficult to handle with foreign competition.

Can every insolvent enterprise be successfully reorganized/ rehabilitated? No. In some instances, technological innovation will have overcome some industries. Amalgamated Buggywhip Inc. may have been a darling of the stock markets in the 1880's but with the advent of the automobile its role as a survivor would be as a small niche player catering to horse fanciers. Some businesses transition themselves—for example, as did Studebaker in shifting manufacturing from wagons to automobiles—only to succumb to competition from other vehicle manufacturers a half a century later.

Today, with the tariff barriers eliminated or virtually non-existent, foreign imports create increasing pressure on domestic industries. Witness the traditional Big Three vehicle manufacturer: worldwide capacity in the vehicle manufacturing business of some twenty percent virtually assures that at some stage, one or more of the Big Three will disappear.

The economic doctrine of comparative advantage in the long run means that everyone in the world, no matter what country they live in, will be better off if there is specialization in particular businesses in which a nation or a region has a comparative advantage (taking into account transportation costs). Simply put, if China is more efficient than Canada

both in the production of clothing and of automobiles, but relatively more efficient at making clothing than automobiles, then both countries would benefit if China produced all the clothing for both countries and Canada all the autos. However, we do not live in a perfect world and governments decide for public policy reasons that they wish to support a variety of businesses. But in doing so, these governments subsidize relatively inefficient industries and the worldwide consumer is penalized. We do, however, live in the short run, not in the long run. It is not easy, nor indeed possible, to readily change a textile mill into an operation which produces carburetors. Industries which prospered under a cheap Canadian dollar may have difficulty adjusting to its newfound strength (or conversely, the newfound weakness of the US dollar), especially when the change was generally unanticipated and so rapid. Many businesses are capital intensive and require many years to emerge from the planning stage to that of full-scale production; a commitment to such an enterprise requires assumptions about exchange rates, government policy (including taxation), inflation and interest rates.

Developing nations may not find it desirable to rely upon one or two primary industries where they have a comparative advantage. For instance, sisal may be cyclical as to production/harvest and as to price competition on a worldwide basis—and it may be under functional competition with, say, plastic rope. Further these developing nations may feel that they need to protect local inefficient industry for a period of time to allow these industries to achieve a critical mass with which to withstand international competition. Short-term subsidies for this purpose may be acceptable, but if they go beyond a legitimate short-term boost, then they become a hidden tax upon the consumer and a direct burden on the taxpayer, meanwhile they signal hope and expectation to other industries that they, too, should benefit from a hand-up which is in truth a handout.

Business on a worldwide basis is increasingly becoming more and more competitive. At the same time the world economy is becoming increasingly more interdependent. To enjoy the higher standard of living which goes with that interdependence, we have to be flexible and adaptable to keep up with that competition. We really do not have a choice of standing still; for if we did, we would be opting out and so becoming poorer.

Canada is a good example of how foreign trade (which is 80% of our Gross National Product on a gross value) benefits a country's economy. NAFTA substantially integrated our economy with that of the United States. Foreign trade with the US represents approximately two thirds of our Gross National Product. Canada and the US are each other's largest trading partner. Each has substantial investments in the other.

This has been a short and simplistic economic analysis to set the stage for the legal concerns involved in cross-border insolvencies. In essence, when things go wrong in a business enterprise, there are much more likely to be implications in various countries, including Canada (and likely at least the US). As Bruce Leonard and I observed about the globalization of business and reorganizations and restructurings in a paper to the Turnaround Management Association Conference in 2001 entitled *Co-ordinating Cross-Border Insolvency Cases*:[1]

> "The tremendous advances in information technology within the last fifteen years have made it possible for businesses to operate in a variety of different countries at the same time and to link all of these operations as if they were right next door. A multinational business operating profitably and internationally can make decisions quickly that affect its global operations; it can allocate resources internationally in a manner which best suits its objectives and it can utilize its going-concern values to augment the value of its underlying operating assets on the basis that the whole is greater than the sum of its parts.
>
> The onset of an insolvency case, however, stops all that and turns the business into a series of disconnected segments in several different countries. In a typical international insolvency, different sets of creditors assert different kinds of claims to different assets under different rules in different countries. The international business that was once carried on comes to an end and separate, unconnected remnants of the organization attempt to continue until they either starve or implode. It is almost as if a cross-border insolvency system had been set up deliberately to *promote* failures and liquidations.

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[1] (West Palm Beach, Florida, October 15, 2001) [unpublished, paper on file with the author].

> The structural framework for dealing with multinational and cross-border businesses that encounter financial difficulties has hardly evolved from the state it was in several decades ago although our recent experience and developments that are on the horizon hold the promise of significant improvements and the prospect of the domestic adoption of the UNCITRAL Model Law is becoming more and more encouraging. There have been initial and limited domestic legislative initiatives into the area of co-operation in international insolvencies and restructurings but until the UNCITRAL Model Law is widely enacted, however, the legal structure internationally for enterprises in financial difficulty can best be described as compartmentalized. When insolvency or financial failure affects a multinational business, it is still most commonly dealt with through a variety of independent, separate and often-unconnected administrations, most often for different, if not conflicting, purposes."

For reason of simplicity, I will only refer to a two country model, specifically Canada and the United States; however, in many instances there will have to be more than two countries involved—for example, ranging from three, Canada, US and England, in the Olympia & York insolvency to scores in BCCI (Bank of Commerce and Credit International) to over 150 in Singer.

What happens when things go awry in a business that operates and/or has investments on both sides of the border? Usually there will be filings under both Chapter 11 of the *US Bankruptcy Code* and usually the *Companies' Creditors Arrangement Act* (CCAA) in Canada. If the activity in the US is primarily derivative of what might be described as a main centre of activities in Canada, then likely, a section 304 *US Code* ancillary proceeding will be brought in the US to stay proceedings there and coordinate them with the main Canadian proceedings. In the reverse situation, the section 18.6 1997 amendments to the CCAA (or indeed Part XIII of the *Bankruptcy and Insolvency Act* (BIA)) may be utilized to the same effect. As a side note, historically and now, the US is used to having a Chapter 11 stay respected essentially on a worldwide basis because so many foreign enterprises have US investments or their principals travel to the US. In contrast many foreign enterprises may be willing to run the risk of ignoring a stay order emanating from a Canadian or other non-US court on the basis of having no tangible connection with the country whose court has issued the stay. An example of this would be the seizure of Canada 3000 planes in Europe by creditors notwithstanding Ground J.'s

CCAA order. In those circumstances, Canadian CCAA applicants would have to obtain foreign recognition of the Canadian order usually on a comity basis to allow for practical enforcement. That process may take some time and the horse will have been taken from the barn before the Canadian order is recognized, as illustrated by Canada 3000. However, at present, it is not unusual for foreign-retained counsel to be waiting by the fax machine for a copy of the CCAA order so that they may obtain a recognition order within a few hours from the US or other major trading partner court, with that recognition order having effect for the whole of the day of issue. The Courts of Canada and the US are very cognizant of the doctrine of comity and the increased volume of proceedings traffic across the 49th parallel has resulted in a familiarity allowing for significant streamlining of applications.

Given that the insolvency condition is inherently chaotic, most of the proceedings are manifestly "real time litigation". However, part of a case may evolve into what might be termed "autopsy litigation". An example of autopsy litigation would be where none of the parties is arguing that a particular segment of the enterprise not be disposed of; as a result, the business may be transferred to the new owner without dispute in exchange for value; however, autopsy litigation may take place, say, a year later to determine how that consideration is to be divided up. The important thing with real time litigation is not to get bogged down in procedural issues, but rather that coordination between the jurisdictions be promoted to the maximum degree. The fundamental cornerstone of that coordination is to have effective and timely communication between the courts of the two (or more) jurisdictions. How is that to be accomplished?

Communication between courts—is that not a radical step? Are there no fundamental issues of procedural fairness involved? The answer is "no" to the first question and "yes" to the second, but that procedural fairness questions have been well addressed over the past decade. There has always been communication between courts—in the past this has usually been through one court issuing an order accompanied by reasons and the other court responding in kind with communications being through counsel in either jurisdiction. However, this is rather time consuming and it does not lend itself to brainstorming problems/solutions in real time.

The need for better, that is more efficient, communications was well illustrated by the Maxwell Communications case of the early 90s. The US and English judges, Brozman and Hoffmann respectively, sensed that the information they were receiving in their respective courts was askew. They independently raised with their respective counsel that a protocol between the two courts would be helpful, not only to resolve an impasse, but also to facilitate better and more timely exchange of information. Interestingly enough with the protocol in place which provided for an intermediary, these two distinguished judges never spoke directly to each other until they met for the first time at an international insolvency conference shortly after the successful conclusion of the Maxwell case. Needless to say that they have become fast personal friends.

About the same time in the Olympia & York proceedings, there was a problem involving governance of the O&Y US subsidiaries. Again a protocol was worked out and accepted by Chief Judge Lifland of the New York Bankruptcy Court and Justice Blair of the Ontario Court. It involved the introduction of another intermediary, the distinguished US diplomat Cyrus Vance who was able to facilitate a *modus vivendi*.

The Maxwell and O&Y protocols were what might be described as single purpose limited in scope arrangements between the courts. With the appreciation that protocols could, if carefully thought out and responsive to each jurisdiction's needs, eliminate value evaporating wastage of time, practitioners in several countries including Canada thought that it would be helpful to provide an acceptable building block menu of principles to assist those involved in transborder insolvencies to finalize "general" protocols. The philosophy was that good fences/good bridges make good neighbours. Under the auspices of the International Bar Association, a working group of teams from more than a score of countries reviewed the commonalities of their insolvency regimes. This project involved major jurisdictions whose insolvency laws and procedures were based upon common law, civil code and mixed or other principles. While English was the working language, there was recognition that the principles had to be expressed in an absolutely neutral language readily translatable into other tongues and legal concepts, thereby avoiding any actual or perceived bias towards the common law. The threat of unintentional bias was quite real since the judiciary in common law jurisdictions, especially the US, England and Canada, had considerably more experience in international judicial cooperation and in this respect had generally utilized the common law philosophy that if something was not forbidden and it made sense to do it, then it was judicially permitted. Key also to the working group

success was the participation of judges along with practitioners from the outset of the project. The IBA project culminated with that body's adoption in September 1995 of the principles under the title of "Concordat". The international insolvency community benefitted not only from the availability of the Concordat principles, but also from the working sessions which allowed the various persons involved to discuss the underlying concerns and commonalities, engage in give-and-take discussions based upon the experience gained in previous cases and to "get to know the other fellows".

Two months after the adoption of the Concordat, a new proceeding, Everfresh, came along. Bruce Leonard, a Toronto lawyer and part of the Canadian team, was involved in this case wherein Everfresh operated legally and functionally intertwined in both Canada and the US by "coincidence", the case came before Judge Lifland and myself and both of us had also been involved in developing the Concordat. It should then be no surprise that the judges on either side of the border enthusiastically supported the concept of developing a more general protocol based on the Concordat principles. While other functional work was progressing, a protocol was developed in a few weeks by the practitioners. Based upon a general consensus of those involved, each court approved the protocol. Matters were proceeding more quickly in Canada than in the US. The protocol was therefore utilized to hold what was the first cross-border joint hearing to co-ordinate the pace of proceedings on each side of the border. The hearing was by way of conference telephone with counsel participating. Given the rather limited scope of the problem, the telephone facility did not constitute any particular problem. However, I would strongly recommend that joint hearings be conducted through a video-conference facility to take advantage of what should be better two-way communication (speakerphones are generally one way) and the ability to "see" and react to the other side of the proceedings. Justice Forsyth of the Alberta Court and Judge McFeeley of the New Mexico Bankruptcy Court in the Solv-X case in 1996 persevered against significant technological difficulties in their telephone conference hearings. But beware—make certain the videoconference connection is workable a day or two in advance on a wet run (not dry run) basis.

After the Everfresh case finished (in about a half year), counsel on all sides were canvassed as to their satisfaction with the process. They estimated that as a result of the more timely and efficient dealing with matters, value was enhanced/preserved by a factor of some 40%. This was

particularly significant when one appreciates that Everfresh was a fairly small insolvency involving some $50 million of value.

Other protocols followed in short order. These included ones outside the US—Canadian ambit, including *Re Commodore Business Machines* (US–Bahamas), *Re AIOC Corp.* (US—Switzerland), and *Re Nakash* (US—Israel), the latter two being of specific interest because they involved common law and civil code jurisdictions and Nakash had its protocol approved by the courts notwithstanding the objection of the most major party. An extensive list of protocols and their actual texts are available on the website of the International Insolvency Institute (III): www.iiiglobal.org. The protocols have become more and more comprehensive and procedures have become streamlined, improved and standardized. Counsel should have no difficulty in any future case in developing a readily acceptable protocol tailored to the specific needs of their case based upon these templates. Judges will be able to appreciate that the judiciary in other cases has been satisfied with the form, content and workability of these protocols. Indeed in many instances the very presence of a protocol has eliminated direct court involvement as the parties merely proceed smoothly according to the principles involved in the protocol. As discussed in the earlier mentioned Turnaround Management Association paper:

> "Protocols are intended to reflect the harmonization of procedural rather than substantive issues between jurisdictions. Protocols typically deal with such items as co-ordination of court hearings in the two or more jurisdictions, co-ordination of procedures dealing with the financing or sale of assets, co-ordination in pursuing recoveries for the benefit of creditors generally, equality of treatment among the general body of unsecured creditors, co-ordination of claims filing processes and, ultimately, co-ordination and harmonization of plans in different jurisdictions. Procedurally, recent cases have tended to use Cross-Border Insolvency Protocols from the early stages of a case. Indeed in 2000, *Re Loewen Group Inc.* (Canada—US), there was a protocol actually entered into as a "first day" order. Protocols, however, are invariably expressed to be effective only upon their adoption and approval by each of the Courts involved in accordance with the local law and practice of each local jurisdiction."

There seem to be many threads which have been developing over the past decade, all with a view to making a suit to fit the requirements of international insolvency. Another example of this would be the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. The Turnaround paper observed:

> "UNCITRAL began a study of the feasibility of achieving higher levels of co-operation in the international insolvency area in April 1994, as a result of an international insolvency colloquium in Vienna sponsored with Insol International. The objective in developing the Model Law was to establish a set of uniform principles that would deal with the requirements which a foreign insolvency representative would need to meet in order to have access to the courts of other countries in cross-border cases. The Model Law Project, however, evolved into a much broader work and ultimately became an agreed-upon international model for domestic legislation dealing with cross-border insolvencies that could be adopted anywhere in the world with or without variations that would reflect the local domestic practices and procedures. The Official Text of the Model Law has now been published and widely disseminated and is available on UNCITRAL's web site at http://www.UNCITRAL.org and on the International Insolvency Institute web site at www.iiiglobal.org (at 'Organizations—UNCITRAL').
>
> The primary goal of the Model Law is to facilitate domestic recognition of foreign insolvency proceedings and to increase international co-operation in multinational cases. Foreign insolvency proceedings are divided into two categories in the Model Law, *i.e.*, 'main' proceedings and 'non-main' proceedings. A main proceeding is one which takes place in the country where the debtor has its main operations. If the foreign proceeding is recognized as a *main* proceeding, the Model Law provides for an automatic stay of proceedings by creditors against the debtor's assets and the suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets. The scope and terms of the stay of proceedings are subject to the normal requirements of domestic law."

The Model Law contemplates a high level of co-operation between courts in cross-border cases. Domestic courts are directed to co-operate "to the maximum extent possible" with foreign courts and foreign insolvency representatives in the Model Law: article 26. The courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative: article 25. Co-operation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court and co-ordinating the administration of the debtor's assets and affairs in both jurisdictions: article 27. The courts may also approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor: article 30.

The UNCITRAL Model Law was being formulated at the time of Canada's 1997 amendments to the CCAA and BIA. Many of the significant concepts of the Model Law are therefore present in our present legislation, although not expressed in the language of the Model Law. The current review of our insolvency legislation will determine whether to keep the present form and incorporate the additional concepts by supplementary language or to delete the present form of section 18.6 of the CCAA and Part XIII of the BIA, replacing that with the specific language of the Model Law, possibly with some amendment. While Canadian courts prior to 1997 relied on their inherent jurisdiction and the principles of comity, specific authorization to engage in court to court communication is now found in section 18.6(2) of the CCAA and section 268(3) of the BIA.

Mexico, Eritrea, South Africa and Japan have passed legislation to enact the Model Law. Unfortunately its adoption in the US has stalled as a result of lobby pressure directed at another portion of the US Code overhaul; as part of that overhaul, the proposed Chapter 15 of the Code would be added to the Code to enact the Model Law which has been variously approved by both the Senate and the House of Representatives over the past several years, but not within the same bill. As a result, it remains in limbo.

The UNCITRAL Model Law is a procedural initiative. There is another UNCITRAL initiative to develop a menu of substantive law presently underway. It is anticipated that the working group will be able to finalize its work on this project (a menu of alternatives, with a review of considerations to be taken into account with each possible selection and

observations on the harmonization of the constituent parts) either at this September's Vienna session or at the next session to take place within a half year. Developing countries will be able to tailor their insolvency regimes to fit their own requirements—an improvement over past initiatives where consultants from a developed jurisdiction would essentially recommend the adoption of the insolvency regime from the consultant's home jurisdiction—for example, US financial consultants invariably recommended that the post-Communist countries adopt what in essence was the *US Bankruptcy Code*. In many of these instances, these countries have gone back to the drawing board after appreciating that such a wholesale incorporation of foreign law did not address their business, social and cultural requirements. (I have previously cautioned against wholesale adoption of provisions of the US Code concepts into Canadian jurisprudence given that the US Code has evolved to meet specific US conditions which may not be present in Canada.) In the remainder of those countries, problems continue since their recently enacted legislation based on the US Code is not suitable for their particular legal, business and social cultures and infrastructures. This is completely unsatisfactory, given that a workable insolvency law and regime is essential to a viable economy and especially necessary in order to attract foreign capital (loan and equity) on any reasonable basis, if at all! This Model Menu will allow developed countries to conduct a checkup on the efficiency and effectiveness of their present insolvency regimes and will therefore assist in recognizing the need for any change. The World Bank is also engaged in a complementary program to upgrade the insolvency regimes in countries around the world.

There is a further initiative by INSOL International, an international organization comprised of insolvency practitioners with an emphasis on practitioners from the accounting and lending sectors. Aside from the biennial Judicial Colloquium sponsored jointly by INSOL and UNCITRAL (1994, 1995, 1997, 1999, 2001 and 2003), INSOL has developed an INSOL Lenders Group. This Group has developed a statement of principles for cooperation among financial institutions during multinational reorganizations. Maximization of value, preservation of viable enterprises and jobs and the avoidance of inefficient cratering have been the guidelines for the S*tatement Principles for a Global Approach to Multi-Creditor Workouts*. Key to the underlying foundation is that the parties involved can negotiate "within the shadow of the law; that is, that the insolvency regimes in the various countries be predictable with certainty and fairness so that negotiations can take place with a minimum

of guesswork as to what would be the outcome if the courts were resorted to on any minor or major point along the way.

Additionally, there has been an American Law Institute (ALI) project on NAFTA Insolvency Law. The Restatement Paper of substantive laws of the US, Mexico and Canada was the first international program undertaken under the supervision of this prestigious US body with major international connections. Once that paper had been completed and accepted, it was thought helpful to see if there could be agreement on procedural matters so that there could be harmonization and coordination of the insolvency proceedings in cases which involved more than one of the NAFTA jurisdictions. This aspect was completed by the tripartite country teams and accepted by the ALI in 2000. One of the most important elements of this was the preparation of the *Guidelines Applicable to Court Communications in Cross-Border Cases*. These guidelines were largely based upon examples of actual cross-border cases involving protocols. The Guidelines may also be accessed through the III website. As indicated in the Turnaround paper:

> "The *Guidelines* recognize that one of the most essential elements of co-operation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganizational proceedings, it is essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises. (This summary is largely derived from Prof. L. Westbrook's very eloquent Introduction to the topic in the ALI's Transnational Insolvency Project *Statement*.)
>
> It is reasonable to expect that many jurisdictions, including most common law jurisdictions, have prohibitions against *ex parte* communications with a Court by one party to a proceeding in the absence of the party to the proceeding. In some jurisdictions, by contrast, the prohibition may be milder and may not even exist at all. Arrangements for court-to-court communications in cross-border cases must not promote or condone any contravention of domestic rules, procedures or ethics. The *Guidelines* in fact specifically mandate that local domestic rules, practices and ethics must be fully observed at all times.

> The *Guidelines* are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications among courts in cross-border cases, however, is both more important and more sensitive than in domestic cases. The *Guidelines* are intended to encourage such communications and to permit rapid co-operation in a developing insolvency case while ensuring due process to all concerned. The concept of court-to-court communications is better seen as a linking of two concurrent court hearings, all conducted in accordance with proper systems and procedures. The only change form a purely domestic hearing is the technological link to the other Court.
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> …
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> The *Guidelines* are intended to be adopted following the appropriate notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations would be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the *Guidelines* at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the *Guidelines*."

One of the issues that a communication linkage may raise however, is the issue of whether the participation by a party in one country in arguments or submissions being made in the hearing in the other country constitutes a form of attornment to the jurisdiction of the other Court. The *Guidelines* attempt to anticipate that difficulty by indicating that such participation will not constitute an attornment to the jurisdiction of the other Court unless the party who participates in the hearing in the other Court is actually seeking relief from that Court. This is consistent with article 10 of the UNCITRAL Model Law which indicates that an application by a foreign representative does not subject the foreign representative or the foreign assets or the affairs of the debtor to the

jurisdiction of the domestic Court for any purpose other than the actual application.

These guidelines have been incorporated into protocols—for example, *Re Matlack Inc.*; *Re PSINet Limited*; and *Re Systech Retail Systems Inc.*[2]

The United States Third Circuit Court of Appeals in a 2002 decision *Re Lernout & Hauspie* had a number of very direct and pointed observations on the need for international cooperation between courts in cross-border cases.[3] It indicated:

> "We strongly recommend, in a situation such as this, that an actual dialogue occur or be attempted between the Courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws…
>
> While we do not know whether the cooperation [in *Maxwell*] was initiated by the court or the parties, there is no reason that a court cannot do so, especially if the parties (whose incentives for doing so may not necessarily be as great) have not been able to make progress on their own.
>
> … [W]e urge that, in a situation such as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice."

I believe that the watchword for any of the protocols and procedures to be tested is as follows: would the informed objective observer say that what was adopted by the Courts after receiving all submissions was fair and reasonable in the circumstances—and indeed, why has this not been adopted before as it is truly common sense.

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[2] *Re Matlack Inc.* (2001), 26 C.B.R. (4th) 45 (Ont. Sup. Ct.) (containing the text of the Guidelines); 01 CL 4109 April 19, 2001 (Toronto Commercial List) & US Bankruptcy Court Delaware 01-01114 (May 24, 2001). *Re PSINet* and *Re Systech* are unreported endorsements adopting the Guidelines: *Re PSINet* 01 CL 4155 July 10, 2001 (Tor ComList) and US Bankruptcy Court (SDNY) 01-13213 (July 10, 2001); *Re Systech* 03 CL 4836 January 30, 2003 (Tor ComList) and US Bankruptcy Court (EDNC, Raleigh Div.) 03-00142-5 January 30, 2003.

[3] *Stoningham Parnters, Inc.* v. *Lernout & Hauspie Speech Prods. N.V.* 310 F.3d 118 (3rd Cir. Del. 2002).

When one looks back ten or twelve years, it is truly amazing what strides have been made in improving how to deal with cross-border insolvency cases. Waiting for the negotiation and adoption of international treaties was simply not feasible; by the time that would have happened, likely another century would have passed. I gave the following report on behalf of the 1997 UNCITRAL/INSOL Judicial Colloquium:

> "Under the auspices of INSOL and UNCITRAL 50 judges from 30 different countries were involved in the Second Judicial Colloquium over the previous two days. The judicial regimes represented were common law, civil law, a combination thereof, and from other traditions besides these. It is not surprising that judges may vary in their approach to matters to reflect different concerns in different parts of the world. However, given that the judicial perspective is to ensure that justice is done in the cases before the court, it is also not surprising that, despite these differences, there is a general consensus of thoughts on international judicial co-operation and communication. The Colloquium has allowed the judges to explore these matters and to appreciate that we have a common interest over a wide variety of subjects.
>
> Of course, law cannot operate in isolation and insulation from the society and economy in which it is to function and regulate conduct and activities. The economy is not merely a domestic one, as it will be influenced by foreign trade and investment going both ways. Therefore, no country's legal system can operate without having regard for the activity of neighbouring states. Given the high degree of internationalism in trade and investment, the world has, in this respect, become a very small place; I believe we must regard each and every state as being neighbours.
>
> …
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> Judges at the Colloquium were of the consensus that it was important to avoid these problems. This could be achieved not only through agreement to co-operate, but they were also of the view that, in essence, where there are concurrent proceedings it should be determined whether deferment to the other court on material issues more directly affecting that jurisdiction may be possible and with reciprocal treatment. We must, of course, recognize the sensitivity of the situation—countries will have concerns about the integrity of their jurisdiction, including substantive and procedural concerns. These must be accommodated and on a two or multiple

> way basis. In addition, there is the aspect that, through improved communication, there could be a timely exchange of valid information amongst the concerned courts. …
>
> …
>
> … INSOL and UNCITRAL will continue to hold a Judicial Colloquium, and INSOL will initiate a separate section for the judiciary to deal with these matters on a continuing basis between Colloquia."

How do the bar and insolvency practitioners fit into this equation?

1. The judiciary rely upon you as professionals—skilled practitioners in the field—to implement these proposals and generally to assist in these matters.

2. As a result of this initiative you will know what is expected of you and how to implement it through building on the Concordat and the UNCITRAL model law and other valuable initiatives from time to time. There will be the desirability of your taking the opportunity during the immediate stabilization period provided by stays to see whether by using the Concordat and the draft UNCITRAL model there can be harmonization between the various concurrent proceedings—both as to procedures and timing. This hopefully will lead to the timely and cost-effective development of a protocol to be entered into amongst affected parties and thereafter submitted for consideration and approval by the respective courts. Once you review the Concordat and the UNCITRAL draft you will see that there is a fertile field of possible steps to consider and adopt with suitable changes into a protocol. It is expected that you will be significantly advanced on the learning curve through the use of Concordat and UNCITRAL so that you will be able to "shortcut" the negotiating time required to table a protocol. It will be helpful to the parties concerned and the legal system generally to make every effort to effect this protocol harmonization.

The courts will rely on you to carry their message of co-operation and communication as expressed in formal orders and accompanying reasons to the other courts—reliably and faithfully.

3. In this regard we in the judiciary may need your assistance to ensure that where transcripts are not a regular feature of the domestic court a transcript to the extent desired by the judge can be made available forthwith. We will also need your assistance with respect to excellence of

translation (not mere words but concepts—the opposite to legal research by computer which is based upon word identification and not concept analysis).

4. You will be expected to advise the local court of what procedures are taking place in other jurisdictions, and to maintain an update of that situation.

5. The courts will recognize the need for you to return to them to obtain appropriate relief from time to time, including adjustment of any initial order or orders which may have been deployed in the immediate emergency circumstances.

We, as judges, will rely upon counsel and insolvency practitioners to take the lead in providing the conduit for judicial co-operation and communication. We are confident that we can rely upon you as professionals to ensure that justice is done.

> "The key in this Colloquium is that the participating judges have reached consensus about being outward-looking—rather than inward-looking. International insolvencies are truly international; they are not local, with merely local solutions. We have progressed beyond national interests; we are now clearly looking at international concerns. As we approach the next millennium, we must not be looking backwards toward the nineteenth and early twentieth centuries; rather, we must be forward looking to solve our problems."

Allow me to conclude by observing that what I have been describing is the way by which courts and the practitioners have dealt with cross-border insolvency matters. However, the general principles and approaches involved here are not restricted to the insolvency arena. Indeed, colleagues who have been engaged in class actions and other general litigation cross-border matters have begun to ask "Why not our sector?", appreciating that there is a need for harmonization and coordination in their fields across provincial and national boundaries. Why not indeed!

British Columbia Tobacco Litigation and the Rule of Law

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A subject that has recently been consuming a substantial portion of my professional time is the rule of law and its impact on British Columbia's suit against the tobacco industry for the recovery of health care costs associated with tobacco use. About seven years ago my law firm was retained as counsel for Philip Morris to defend it in proceedings that were anticipated pursuant to legislation that was being passed by the government of British Columbia. Since then, the legislation, which borrowed heavily from similar legislation in Florida, has undergone two further substantial revisions in an attempt to bring it into compliance with Canada's constitutional requirements and at the same time preserve the potential success of the province's claim. The first revision occurred before the legislation was proclaimed and the second, after the British Columbia Supreme Court found the Act was unconstitutional because it exceeded constitutionally imposed territorial limitations. The third version of the legislation has recently been rejected on the same ground, that the legislation is extraterritorial.

Two Philip Morris companies found themselves named as defendants in the latest proceedings brought by the British Columbia government. Philip Morris International was incorporated in 1986 and does not manufacture, market or sell cigarettes anywhere. It supplies management services to sister companies. The second company, Philip Morris USA, manufactures cigarettes in the United States. Marlborough is its best known brand. It is the company that started in the cigarette business and is now a wholly owned subsidiary of Altria, a large multinational company which owns companies such as Kraft General Foods. Philip Morris' history in Canada began in the 1950s with the acquisition of Benson & Hedges. This company amalgamated with Rothmans Canada in 1986 and Philip Morris was left with a 40% interest in Rothmans, Benson & Hedges.

The government has based its actions solely upon the British Columbia *Tobacco Damages and Health Care Costs Recovery Act*. No claims are made under the common law. Although the Act does have some generic provisions such as the removal of limitation periods, it primarily creates a cause of action for the benefit of the government against tobacco manufacturers. There are three tobacco manufacturers in Canada whose products are available in British Columbia. The cause of action created by the Act does not follow the traditional requirements of a tort, particularly with respect to causation and damages. The Act provides special evidentiary rules which benefit the government in the action. From the perspective of a Defendant, the Act is designed to significantly improve the government's prospects of success on liability and minimize potential problems with proving the damages to be awarded, which could potentially total many billions of dollars.

This legislation raises fundamental constitutional concerns. As part of our application urging the British Columbia court to decline jurisdiction over the claim, we led expert evidence from leading constitutional scholars in Europe, the United States and Japan, each of whom stated that the application of the British Columbia legislation would be taken to fundamentally violate the constitutions of each of those jurisdictions. We also led opinion evidence that because of those violations, a judgment based upon the Act would not be enforced in those jurisdictions. The government countered with differing opinions, but it is clear that this legislation would be controversial from a constitutional perspective in those jurisdictions. Most legally trained people would find this legislation offensive, although some seem prepared to overlook this, perhaps because of the general unpopularity of the targeted defendants.

The Philip Morris portion of the constitutional challenge to the legislation focussed on the rule of law. It was based upon a series of Supreme Court of Canada cases where unwritten principles of the Constitution, including the rule of law, were formally recognized as Canadian constitutional standards.[1] There has been a great deal of scholarly writing and debate on the rule of law and its breadth. Dicey's early formulation of the principle was exceedingly narrow but modern scholarly analysis of the rule of law examines how it has played a fundamental underlying role in modern western constitutional democracies. The scholars attempt to distill the broadly accepted principles that have been generally applied in the constitutions, legislation and common

[1] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Provincial Court Judges Reference*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

law of developed western nations. There is also some case law on the meaning of the rule of law in Europe. The difficulty is that, although the Supreme Court of Canada has said that the rule of law is one of the "pillars" of our constitution and that together with the other unwritten principles it forms the "... grand entrance hall to the castle of the Constitution",[2] the Court has not fully defined the nature and extent of the rule of law as it applies in the Canadian Constitutional context and the law respecting the availability of remedies is still being developed.

One of the issues in the British Columbia tobacco litigation is how the courts will define the rule of law. The parties argued two very different conceptions of this principle. The Attorney General took the position that the rule of law is comprised solely of the following principles:

1. There must be a basis in law for any action on the part of the state or its officials which limits individual freedoms.[3]
2. The law must be equally applied to all those to whom the law by its terms applies[4].
3. If the effect that declaring legislation invalid on the basis that it violates a provision of the Constitution of Canada would be to destroy the institutions of government within the jurisdiction in question, and thereby produce a state of legal chaos, the declaration of invalidity should be suspended for such time as is necessary to permit the remedying of the problem that gave rise to the constitutional violation.[5]
4. All action on the part of governments in Canada must be consistent with the provisions of the Constitution of Canada and any government action that is found by the courts to be "inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect", in accordance with the provisions of section 52(1) of the *Constitution Act, 1982*

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2 *Provincial Court Judges Reference*, *ibid*. at para. 109.

3 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1897) at 85 ff; *Roncarelli* v. *Duplessis*, [1959] S.C.R.121.

4 Dicey, *ibid*.

5 *Re Manitoba Language Rights*, *supra* note 1.

> (this principle, known as the principle of constitutionalism, often stands on its own as an independent principle).[6]

In contrast, our argument respecting the content of the rule of law as it applies to this legislation was diametrically opposed to the Attorney General's position. We focussed upon what we submitted were five violations of the rule of law using a much broader formulation. We were much like two ships passing in the night. The Government's conception of the rule of law would clearly provide our clients with no basis for relief. If the position we advocated was accepted, there remained the question of what relief was available. This case may ultimately provide some definition of the role that the rule of law is going to assume in the Canadian constitutional context.

A brief review of the aspects of the rule of law that we asserted were violated by the Act follows.

I. THE REQUIREMENT OF GENERALITY IN THE LAWS

Here we relied upon the proposition that 'generality' in the law is a central requirement of the rule of law. This requires that a legal rule take the form of "a ... command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time."[7] To conform with this principle, legal norms should represent "... a hypothetical judgment of the state regarding the future conduct of its subjects..." Rousseau's formulation was as follows:

> "When I say that the object of law is always general, I mean that the law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name... In a word, no function which has a particular object belongs to the legislative power."[8]

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6 *Refence re Quebec Secession*, *supra* note 1.

7 Quoted in R. Flathman, "Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law" in I. Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994) 297 at 305.

8 F.L. Neumann, "The Change in the Function of Law in Modern Society", in W.E. Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann & Otto Kirchheimer* (Berkeley: University of California Press, 1996) 101 at 106-107.

We argued that to achieve "generality" in the sense required by the rule of law, legislators should not in enacting laws "foresee what will be their effects on particular people... [S]pecific ends of action, being always particulars, should not enter into general rules."[9]

Generality is violated by laws which single out particular groups or individuals for special treatment. One author has said in this connection that:

> "Only when such interferences [with liberty and property] are controlled by general laws is liberty guaranteed, since in this manner the principle of equality is preserved. Voltaire's statement that freedom means dependence on nothing save law refers only to general laws. If the sovereign is permitted to decree individual measures, to arrest this man or that one, to confiscate this or that piece of property, then the independence of the judge is extinguished. The judge who has to execute such individual measures becomes a mere policeman. Real independence presupposes the rule of the state through general laws."[10]

Absent this form of "generality" the law ceases to be a system of norms, and instead permits government to engage in the kind of arbitrary behaviour which is the "single greatest antagonist" of the objectives underlying the rule of law.[11]

The British Columbia legislation at issue in our case is not directed to "unknown people" but instead targets a finite and relatively small group of tobacco manufacturers. Nor is it directed to future and hypothetical conditions but is instead directed to known or supposed past events. It attaches entirely new consequences to those past events. This is done for the sole benefit of the Government as claimant in a specific action. Our argument was that this constituted a violation of the requirement under the rule of law of generality in the laws, so that the Government was obliged to justify the legislation on an analysis similar to that under section 1 of the Charter.

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9 Flathman, *supra* note 7 at 306-307, quoting from F. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960) at 152.

10 Neumann, *supra* note 8 at 118; see also A.C. Hutchinson & P. Monahan, "Democracy and The Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto, Calgary, Vancouver: Carswell, 1987) 97 at 122; G. de Q. Walker, *The Rule of Law: Foundation of a Constitutional Democracy* (Carlton: University Press, 1988) at 25.

11 Walker, *ibid*.; Flathman, *supra* note 7 at 303-304.

Justice Holmes, in dealing with this argument, found that generality as we had presented it was not a constitutionally entrenched rule and could not therefore assist.[12]

II. THE REQUIREMENT THAT LAWS SHOULD BE PROSPECTIVE AND NOT RETROACTIVE

The second aspect of the rule of law we relied upon was the requirement that laws should be prospective and not retroactive. In order to conform with the rule of law, legislation must, absent reasonable justification, be prospective in nature. This aspect of the rule of law serves to protect the reasonable expectations of those bound by the laws enacted by legislature: "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."[13]

Conversely, retroactive legislation, which would alter the law which was applicable to acts at the time of their commission, violates the rule of law:

> "Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.
>
> No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law[s] are

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[12] *HMTQ* v. *Imperial Tobacco Ltd.*, 2003 BCSC 877 at para. 133 [hereinafter *Imperial Tobacco*].

[13] *Black-Clawson International Ltd.* v. *Papierwerke A.G.*, [1975] A.C. 591 (H.L.) at 638 (emphasis added); see also *Reclamation Systems Inc.* v. *Rae* (1996), 27 O.R. (3d) 419 (Gen. Div.) at 431-435.

> diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. It upsets plans and undermines expectations and it may impose penalties or other disadvantages without fair warning."[14]

The British Columbia tobacco legislation abolishes limitation defences and revives any actions which have been dismissed in the past on the basis of limitation defences. Under section 10 of the Act, "… a provision of [the] Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2(1) arising from a tobacco-related wrong, whenever the tobacco-related wrong occurred." The result is that the Act imposes on tobacco manufacturers substantial new consequences for past acts. This initial proposition was accepted by the Court but it went on to adopt the Attorney General's argument that because the Act simply attaches new consequences to past wrongs it is not retroactive in a manner that offends the rule of law.[15] In other words, since the manufacturers knew it was wrong to breach a duty when they breached it, all the legislation does is to extend the consequences of those wrongful acts to include liability to the Government for health care costs. This explicitly raises the question of the extent to which new consequences can be retroactively attached to past wrongs under the rule of law.

III. THE REQUIREMENT OF EQUALITY IN THE LAW AS BETWEEN SUBJECTS

Our third argument was that the rule of law requires equality in the law as between subjects. The complaint under this heading was that members of the tobacco industry are, under the British Columbia legislation, treated differently from similarly situated product manufacturers who are not members of the tobacco industry and that the distinction could not be constitutionally justified.

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14 R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto, Vancouver: Butterworths, 1994) at 513; *Re Indian Residential Schools*, [2000] A.J. No. 638. (Q.B.), online: QL (AJ) at para. 29.

15 *Imperial Tobacco*, *supra* note 12 at paras. 111, 122-125.

It is well established that the rights to equality before the law and equal protection of the law are central aspects of the rule of law. In its modern formulation, this requires that there should be equality not only in the application of the laws, but in the substance of the laws themselves. This has been recognized by acknowledged legal scholars including Chief Justice McLachlin.

The substantive right to equality in the laws is also an unwritten "fundamental right" under European Community law. Anti-discrimination provisions found in the EC Treaty are regarded merely as "specific enunciation[s]" of this fundamental principle of substantive equality, which has broader and more general application. This fundamental principle in European Community law requires that Community legislation must be such that "… similar situations shall not be treated differently unless differentiation is objectively justified".[16]

The reason this principle of equality must be "entrenched beyond the reach of simple majority rule [*i.e*. legislature]" was articulated as follows in the *Quebec Secession Reference*:

> "... a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection."[17]

The effect of the Act is to abrogate the elements of a traditional common law claim against a manufacturer—and to replace it with a regime under which a defendant who has committed no actionable wrong against the plaintiff (or, for that matter, anyone else) may be found liable to a government which has suffered no loss. We argued that this is a classic illustration of "the majority [through the legislature] ... ignor[ing] fundamental rights in order to accomplish collective goals more easily or effectively"—the danger cited by the Supreme Court of Canada in the

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[16] S.A. de Smith et al., *Judicial Review of Administrative Action*, 5th ed., (London: Sweet & Maxwell, 1995) at 577-578; *Weiser* v. *Caisse nationale des barreaux français*, C-37/89, [1990] E.C.R. I-2395 at I-2420-2421 (E.C.J.); *Ruckdeschel* v. *Hauptzollamt Hamburg-St.Annen*, C-117/76 & C-16/77, [1977] E.C.R. I-1753 at I-1769 (E.C.J.).

[17] *Reference re Quebec Secession*, *supra* note 1 at para. 74.

Quebec Secession Reference as demanding the constitutional entrenchment of equality before the law beyond the reach of majority rule.[18]

We also argued that the Government's singling out of tobacco manufacturers alone for this arbitrary and "unequal" treatment must be subject to much more rigorous scrutiny in circumstances where the underlying object is to generate revenue for the Government itself. Mr. Justice Holmes rejected this argument on the basis that treating all participants in the tobacco industry equally was sufficient compliance with the rule of law.[19] This is another aspect of the rule of law which may require further judicial definition.

IV. THE REQUIREMENT OF EQUALITY AS BETWEEN SUBJECTS AND THE CROWN

Our fourth argument raised the issue of equality between subjects and the Crown. We argued that the Act gives the Government, in advancing this claim, special and unprecedented exemptions and privileges to which no other claimant is entitled at common law, and that the rule of law analysis requires that such special exemptions and privileges in favour of government be objectively justified.

The central element of this aspect of the rule of law is that, with limited exceptions, the same laws should be applied to government as to private parties. This principle operates to control the coercive powers of the state which might otherwise be used to oppress private parties. Professor Hogg (as he then was) has stated: "In that way, government is denied the special exemptions and privileges that could lead to tyranny".[20] Once again this aspect of the rule of law has been the subject of extensive scholarly writing which points out the dangers of allowing government to afford itself special privileges in its relations with private citizens.

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18 *Ibid*.

19 *Imperial Tobacco*, *supra* note 12 at para. 141.

20 P.W. Hogg & P. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 1-2, 156; E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 10th ed. (London and New York: Longman, 1985) at 92; Ontario Law Reform Commission, *Report on The Liability of the Crown* (Toronto: Queen's Printer, December 15, 1989) at 2-3.

The British Columbia Court held that the Crown's right to recover from tobacco companies did not have to be identical to that of an individual smoker, because to do so ignores the nature of an aggregate action, the nature of the loss and who sustained it.[21] However, this analysis, which focusses exclusively on the aggregated aspect of the claim, does not take into account other features of the Act, such as the abrogation of limitation periods, the presumptions in favour of the government regarding causation, the provision for the calculation of health care costs, which enable it to potentially recover this amount without taking into account the taxes which it collected on the sale of the cigarettes, or explain how the government is able to justify these features of the Act in a legal system which respects the rule of law.

V. THE REQUIREMENT OF A FAIR TRIAL

The last aspect of the rule of law that we raised was the requirement of a fair trial. We argued that a "fair trial" requires that parties to the proceeding must have a reasonable opportunity of presenting their case under conditions which do not place any party under a "substantial disadvantage". This right has been aptly described in the jurisprudence of the European Court of Human Rights as the right to "equality of arms". The effect of the Act, we submitted, is to change the "rules of engagement" to favour the Government in its action against the tobacco industry. The Act imposed specific changes in the law directed solely to the Government's action against the tobacco industry which were selectively designed to minimize problems, defences, and gaps in proof that have posed obstacles to the success of similar litigation in the past. The Act was in other words designed to ensure to the extent possible that this specific litigation was "unwinnable" by the defendants. The Court in dealing with this issue concluded that there was nothing inherently unfair in an aggregate action and accordingly found no violation of the rule of law.

In summary the Court held with respect to the five alleged violations of the rule of law, they either were not violations or were not recognized as carrying constitutional consequences.

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[21] *Imperial Tobacco*, *supra* note 12 at para. 150.

VI. GOVERNMENT JUSTIFICATION OF VIOLATIONS OF THE RULE OF LAW

Obviously, the requirements of the rule of law, however it is ultimately defined by the courts, cannot be regarded as absolute, but instead must be balanced against other constitutional values. The courts have not yet formulated a clear test on this issue, but Chief Justice McLachlin has said that in societies governed by the rule of law, the exercise of public power is only appropriate where it can be justified in terms of "rationality and fairness".[22] In *Mackin*, a strong majority of the Supreme Court of Canada said that where there is an infringement of an unwritten constitutional principle which plays a vital role in the Canadian constitutional structure (in that case, the principle of judicial independence), the onus on the Government to justify the infringement is a "more demanding" one than (even) that imposed under section 1 of the *Charter*. In connection with issues relating to the financial security of the judiciary, the example cited by the Supreme Court of Canada as being a potentially appropriate justification for infringement was "… cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy."[23]

The Government faces two significant difficulties in justifying its legislation. The first arises out of the Supreme Court of Canada's recognition in the *Mackin* case that section 1 of the *Charter* provides the appropriate framework for the more demanding justification analysis required in the case of an infringement of fundamental unwritten constitutional principles (para. 73). Under section 1 of the *Charter*, enumerated rights are guaranteed "…subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". We argued that a retroactive law cannot be regarded as a limit "prescribed by law" for the purpose of justifying a breach of fundamental rights.

The issue of justification of interference with fundamental rights has been considered under the *European Convention on Human Rights* which requires in identical terms that a restriction on rights must be "prescribed by law". It has been consistently held in the European cases decided in this connection (which the Supreme Court of Canada has acknowledged as being "a very

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[22] B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law", (1998)12 C.J.A.L.P. 171 at 174.

[23] *Mackin* v. *New Brunswick (Minister of Finance)* (2002), 209 D.L.R. (4th) 564 (S.C.C.) at paras. 71-73 [hereinafter *Mackin*].

valuable guide" in connection with constitutional issues implicating the rule of law[24]) that the phrase "'prescribed by law' ... refers to the *quality* of the law, requiring it to be compatible with the rule of law, a principle which is expressly mentioned in the preamble to the Convention". It is considered implicit in this latter requirement that a restriction on fundamental rights can only be regarded as being "prescribed by law" where it meets the requirements of:

- accessibility: "the law must be adequately accessible: the citizen must have an indication which is adequate in the circumstances of the legal rules which are applicable to the given case"; and
- foreseeability: the law must be formulated with sufficient precision to enable a person affected to regulate his or her conduct and to foresee with reasonable certainty the consequences that a given action will entail.[25]

Assuming that the Act violates numerous precepts of the rule of law, then by virtue of its retroactivity it also fails to meet these requirements of accessibility and foreseeability which are essential to the rule of law. We argued that the Act cannot for this reason be characterized as a "reasonable limit prescribed by law" within the meaning of section 1 of the *Charter* in order to justify the numerous violations of the rule of law nor, as any form of legitimate justification under the "more demanding" analysis required in the case of a violation of fundamental unwritten constitutional principles.

The second difficulty the government faces on this issue is that although one may be able to justify one or the other of the five violations of the rule of law to some meaningful standard, it is a much greater challenge to justify the violations when viewed in combination.

What precisely is required to justify legislation that violates the unwritten principles of our constitution remains to be clarified by the higher courts. Justice Holmes did not deal with this issue in light of his findings that there were no constitutional violations of the rule of law.

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24 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 636-637, 640-643.

25 R. Clayton et al., *The Law of Human Rights* (Oxford University Press) at 321-324; *Sunday Times* v. *United Kingdom* (1979), 2 E.H.R.R. 245 (Eur. Ct. of Human Rights) at paras. 46-50; *Malone* v. *United Kingdom* (1984), 7 E.H.R.R. 14 (Eur. Ct. of Human Rights) at paras. 66-67, 79-80.

VII. WHAT ARE THE CONSEQUENCES OF A VIOLATION OF THE RULE OF LAW?

The existing decisions of the Supreme Court of Canada, dealing with the effects of the unwritten principles underlying the constitution, have received differing interpretations by Canadian trial courts and our courts of appeal. Understandably, as a trial judge, one would be hard pressed to strike down legislation in circumstances where the meaning of the rule that you are applying has not been clearly defined by any court in Canada, is the subject of extensive scholarly debate, and where no Canadian court has expressly set aside legislation on this particular ground alone.

VIII. LEGISLATION VIOLATING UNWRITTEN CONSTITUTIONAL PRINCIPLES IS INVALID

We argued and the decisions of the Supreme Court of Canada support the view that if the violations of the rule of law are not properly justified by the Government, then the legislation must be struck down as being unconstitutional.[26] Although the authority on this point has been developing as the tobacco litigation has proceeded, it is arguably not yet definitive. Further support for our position is found in section 52 of the *Constitution Act* which provides in section 52(1) that "… any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The question then reverts to one of whether there are unwritten principles which form part of our constitution and if so, what are they?

In the constitutional sphere, the Supreme Court of Canada has recognized that the adoption of the *Charter* had the effect of transforming the Canadian system of government to a significant extent "from a system of Parliamentary supremacy to one of constitutional supremacy", with the proviso that Parliament and the legislatures retain their supremacy to the extent that they can still exempt themselves from the *Charter* and the Constitution can, at least in theory, be amended under the amending formula.

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[26] *Babcock* v. *Canada (Attorney General)*, 2002 SCC 57; *Hunt* v. *T&N*, [1993] 4 S.C.R. 289; *Mackin*, *supra* note 23; *Provincial Court Judges Reference*, *supra* note 1; *Rice* v. *New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.); *Re Manitoba Language Rights*, *supra* note 1; *Reference re Quebec Secession*, *supra* note 1.

Since our trial court's most recent decision was rendered, the Supreme Court of Canada handed down its reasons in *Ell* v. *Alberta*[27] where it dealt with the unwritten principle of judicial independence as it applies to justices of the peace in Alberta. In that case the court concluded that the unwritten principle of judicial independence applied and was violated, but it also held that the violation was justified in the circumstances by the important legislative purpose of improving the quality of justice in the Province of Alberta, in particular by independently setting minimum qualifications of presiding justices of the peace and assigning unqualified justices of the peace to other responsibilities. It is clear from the court's reasons, however, that the legislation would have been struck down for a violation of an unwritten constitutional principle had the violation not been found to have been justified. This case provides strong support for our argument that, in proper circumstances, legislation can be struck down for a violation of unwritten constitutional principles.

Given his findings on violations of the rule of law, Mr. Justice Holmes did not have to consider the question of justification. He did, however, conclude that the rule of law cannot be used to strike down legislation. He also concluded that the rule of law could not be "invoked to give freestanding rights to individuals" and he went on to concur with Madam Justice Allan's earlier opinion[28] that violations of the rule of law may be used to inform the interpretation of legislation, but not to strike it down.[29]

IX. THE GOVERNMENT'S CONDUCT IN COMMENCING ACTION UNDER THE ACT IS UNCONSTITUTIONAL

Our argument under this heading was that, even if the courts lack jurisdiction to strike down the Act itself for violation of the rule of law, the court clearly has jurisdiction to invalidate the Government's action in commencing litigation under the Act. In the *Quebec Secession Reference*, a unanimous Supreme Court of Canada confirmed that fundamental unwritten constitutional principles, which include the rule of law, may "… constitute substantive limitations upon Government action", and that they operate to fill gaps in the constitutional text. These principles, the court said are "…

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27 *Ell* v. *Alberta*, 2003 SCC 35.

28 *Johnson* v. *British Columbia (Securities Commission)*, 67 B.C.L.R. (3rd) 145 (S.C.C.) at para. 25.

29 *Imperial Tobacco*, *supra* note 12 at para. 164.

invested with a powerful normative force, and are binding upon both courts and governments." With particular reference to the unwritten principle of constitutionalism and the rule of law, the court said:

> "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution... The Constitution binds all governments, both federal and provincial, including the executive branch... They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[30]

These passages were quoted by the Ontario Divisional Court in a case involving a challenge to "directions" issued by a Hospital Services Commission, which would have destroyed the ability of Ontario's only francophone hospital to provide truly francophone medical services and training. The applicants contended that the directions were unconstitutional for violation of their entitlement to "protection of minority rights"—which, together with "constitutionalism and the rule of law" had been identified in the *Quebec Secession Reference* as being a "fundamental [albeit, unwritten] organizing principle" of the Canadian Constitution. The court rejected the respondent's argument that a violation of these unwritten principles gave rise to no remedy, and struck down the impugned directions as being unconstitutional.[31]

An appeal from this decision was dismissed by the Ontario Court of Appeal, which expressly affirmed the distinction drawn by the Divisional Court between the validity of legislation and the constitutionality of conduct under the legislation.[32]

While there may be controversy (at least in the lower courts) about the jurisdiction of the courts to strike down legislation for violation of fundamental unwritten constitutional principles, we argued that the courts clearly have jurisdiction to invalidate other government conduct which violates these fundamental precepts. Mr. Justice Holmes rejected this argument,

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30 *Reference re Quebec Secession*, *supra* note 1 at paras. 54, 72.

31 *Lalonde* v. *Ontario (Commission de restructuration des services de santé)* (1999), 48 O.R. (3d) 50 (Div. Ct.) at 66-68, 83-84.

32 *Lalonde* v. *Ontario (Commission de restructuration des services de santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.).

distinguishing the *Lalonde* decision on the basis that the underlying legislation in that case required the Government to take into account the "public good" when making decisions.[33]

X. DECLARATION THAT THE LEGISLATION VIOLATES THE RULE OF LAW

Finally, we argued in the alternative that if legislation cannot be set aside for violation of the rule of law, then the applicants would be entitled to a declaration that the Act violates the rule of law. Such a declaration lacks coercive effect, but it is responsive to contemporary notions of the courts' role as critical participants in a constitutional "dialogue" with the legislative and executive branches of government, and indeed, to the obligation of the courts as "trustees" of our constitutional rights and freedoms. Another unsuccessful submission!

SUMMARY

In summary, the Supreme Court of Canada has, through its clear recognition of unwritten constitutional principles, apparently opened the door to the grand entrance hall of the Constitution. The subject is intriguing but it is also complex and uncertain. In the context of the rule of law, answers to the following questions require substantial clarification by the courts:

What principles are encompassed by the rule of law in the Canadian constitutional context?

Do different aspects of the rule of law carry different weight in the constitutional context?

What is the test that must be satisfied by government to justify violations of the rule of law?

Does the test vary depending upon the manner in which the rule of law is violated?

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[33] *Imperial Tobacco*, *supra* note 12 at para. 168.

What are the consequences of a violation of the rule of law?

Finally, will the idea of unwritten constitutional principles continue to develop and become a defined and entrenched part of our constitutional law or will the complexities and uncertainties this theory raises force the Court to convert the entrance hall to a vestibule or close the door and abandon it altogether?

British Columbia's Tobacco Litigation and the Rule of Law

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I think it appropriate to begin by telling you that I was invited to participate in this panel because of a concern on the part of the conference organizers that, since there are obviously two sides to the dispute between a number of major Canadian and foreign companies engaged in the manufacture of tobacco products and the Government of British Columbia about the constitutionality of British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*,[1] it would be better for you to hear from representatives of both sides rather than just one. Ross Clark, counsel for one of the foreign companies, Philip Morris Inc., has succinctly summarized the position taken by his client on the issue with which it has been primarily concerned, which is whether the Act should be struck down because it offends the rule of law.[2] I have been involved on the Government's side of this dispute for a number of years now, in fact since the enactment of the current Act's predecessor in 1997, and can therefore appropriately be viewed today as the representative of that side. In that capacity, I will attempt to summarize equally succinctly the position the Government has taken in response to Philip Morris' submissions on that issue.

It is important at the outset to note, as Mr. Clark has done in his paper, that the rule of law is not the only basis upon which the tobacco manufacturers are attacking the constitutionality of British Columbia's legislation. They are also attacking it on the basis of the principle of judicial independence and federalism grounds, specifically in the latter regard on the ground that the Act exceeds the territorial limitations under which provincial legislatures are constitutionally permitted to legislate. While the manufacturers have so far not prevailed on their rule of law and judicial independence arguments, they have prevailed—in relation to both

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1 S.B.C. 2000, c. 30

2 D.R. CLARK, "British Columbia Tobacco Litigation and the Rule of Law" in this volume.

the current statute and its predecessor—on their federalism argument.[3] I am not going to speak today to the other grounds advanced by the manufacturers in their attack; I am going to limit myself, as Mr. Clark has done, to the rule of law ground. In respect of that ground, I should also note that Philip Morris' rule of law argument differs somewhat from the rule of law argument advanced by the Canadian companies involved in the litigation. While some of what I say has application to both lines of argument, I am going to limit myself to the line of argument advanced by Philip Morris, since it is that line of argument that Mr. Clark has summarized for you today.

I also want to alert you to the fact that, while I have a representative function to perform here today, I am not going to limit what I say to a statement of the Government's position on the issues raised by Mr. Clark. This is obviously not an appropriate forum for a dry run of part of the appeal that is scheduled to take place in late November in the British Columbia Court of Appeal.[4] Moreover, it would be impossible in the short time available to me to do justice to the lengthy and multifaceted set of arguments that the Government will be making on that appeal on the rule of law issues that have been raised by Philip Morris.

While I am going to provide you with an outline of the Government's position on those issues, I am also going to make some general comments about what seems to me to be the most important and most interesting of the questions raised by the rule of law-based challenge to the validity of British Columbia's legislation, at least from an academic standpoint. That question is whether the so-called organizing and underlying principles of Canada's constitution—like the rule of law—can be used as independent bases to strike down otherwise valid federal and provincial legislation. While nothing I say in the course of making these comments will be inconsistent with the position the Government of British Columbia is taking on this question in our case, it is important to note that I make them not in my capacity as a representative of that government, but as a legal scholar who has for some time had and continues to have a genuine academic interest in the issue.

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[3] See *JTI—Macdonald* v. *B.C. (A.-G.)* (2000), 184 D.L.R. (4th) 335 (B.C.S.C.) and *HMTQ* v. *Imperial Tobacco Ltd.*, 2003 BCSC 877.

[4] The Court heard the appeal in November 2003 and reserved judgment.

I. THE RULE OF LAW AND THE TOBACCO LITIGATION IN B.C.

I begin then, wearing my representative hat, with an outline of the position the Government of British Columbia has taken in response to the rule of law arguments that Philip Morris has been advancing in its attack on the *Tobacco Damages and Health Care Costs Recovery Act*. Those arguments have been summarized in some detail by Mr. Clark in his paper, and I do not propose to repeat that summary here, beyond noting that the arguments generally are to the effect that (a) the rule of law as a legal principle should be understood to mean certain things—for example, that legislation must be general in its application, that it must be prospective in its application, and that it must treat all subjects equally and provide for fair trials; (b) the Act fails to meet these requirements; and (c) for that reason, it should be declared unconstitutional and struck down.

The position the Government has taken in response to these arguments varies somewhat, of course, as one moves from one of the proposed meanings of the rule of law to another. For example, the Government has responded to the equality and fair trial branches of the argument on their merits—that is, by contending that the fact that the Act deals only with claims against the tobacco industry can be easily explained and justified, and that any trial of the aggregate cause of action for which the Act provides satisfies the fair trial standard. However, the Government's position does incorporate a number of general propositions, and for the purposes of this paper, I am going to limit myself to them.

Those general propositions can be summarized as follows:

(1) The Supreme Court of Canada, in cases like the *Manitoba Language Rights Reference*,[5] has defined the rule of law for legal purposes (and apart from the related but distinct principle of constitutionalism) in terms that suggest it has three and only three elements, namely

(a) a requirement "that the law [be] supreme over the acts of both government and private persons"[6]—or, in terms that express this principle more broadly, that the law applies equally to all those to whom by its terms it applies;

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5 [1985] 1 S.C.R. 721. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

6 *Reference re Secession of Quebec*, *ibid*. at 258.

(b) a guarantee "to the citizens and residents of the country [of] a stable, predictable and ordered society in which to conduct their affairs,"[7] reflecting what in the *Manitoba Language Rights Reference* the Court referred to as "the more general principle of normative order";[8] and

(c) the need for a basis in law for any action on the part of the state or its officials which limits individual liberty, or the requirement that "the relationship between the state and the individual must be regulated by law,"[9]

none of which elements, properly understood, is engaged in this case.

(2) While it may be the case, as Mr. Clark contends, that there is considerable support in the scholarly writings of political, social and legal theorists for an expanded understanding of the rule of law—one that might well sustain some if not all of the interpretations of it advanced by Philip Morris—and some support for such an understanding in the jurisprudence of other nations,[10] there is very little if any meaningful support for such an expanded understanding in our own jurisprudence.

(3) If accepted as valid, and given the effect contended for, most of the extended meanings of the rule of law advanced by Philip Morris—notably those grounded in concerns about the right to equality, the right not to be subjected to retrospective laws and the right to a fair trial—would render superfluous provisions of the *Charter* that provide explicit textual recognition of such rights.

(4) At the same time, these extended meanings, if accepted and given the effect contended for, would provide constitutional protection to interests that the drafters of the *Charter* for the most part very deliberately chose not to protect—the economic interests of corporations.

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7 *Ibid*. at 257.

8 *Supra* note 5 at 749.

9 *Reference re Secession of Quebec*, *supra* note 5 at 257.

10 Mr. Clark's contentions in this regard are summarized in his paper.

(5) Not only would the acceptance of these arguments render a number of *Charter* provisions redundant and provide constitutional protection to interests deliberately left unprotected by the drafters of the *Charter*, it would—because of the "higher standard of justification" aspect of these arguments—produce the anomalous result that the "unwritten" rights contended for would receive a higher level of protection than the rights spelled out in the *Charter* are entitled to receive.

(6) Even if the rule of law can be understood in the broad terms advanced by Philip Morris, our constitutional jurisprudence overwhelmingly supports the proposition that the rule of law cannot be used as an independent basis upon which to attack the validity of federal or provincial legislation.[11]

Most of these propositions are, I hope, self-explanatory. However, two of them, I acknowledge, are not, and I would like to add a gloss to the mere statement of them to make their meaning clearer. One is the first, which sets forth the Government's position with respect to the content and scope of the rule of law as a legal principle under Canada's constitution. That position is that the content and scope have been authoritatively determined to include three distinct elements. The first of these elements, which was featured prominently in Professor Dicey's classic 19th century formulation of the rule of law,[12] is that the law must be applied equally to all those to whom *by its terms* it applies. The equality with which this element of the rule of law is concerned, important as it is, is limited to the manner in which laws are *applied*. It does not reach the *content* of the laws—that is, it does not provide a standard against which the content of the laws can be measured, and, if found wanting, struck down. Putting it slightly differently, this conception of equality takes the content of the law as given. It is for this reason that the Government is asserting that this conception of equality—and hence this element of the rule of law—can be of no assistance to Philip Morris and the other tobacco manufacturers in

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[11] See *e.g. Bacon* v. *Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51 (Sask. C.A.) (leave to appeal to S.C.C. dismissed June 1st, 2000); *Johnson* v. *B.C. (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 (S.C.); *Westergard-Thorpe* v. *Canada (A.-G.)* (2000), 183 D.L.R. (4th) 453 (F.C.A.D.); *JTI-Macdonald Corp.* v. *B.C. (A.-G.)*, *supra* note 3; *Samson Indian Nation and Band* v. *Canada*, [2003] F.C.J. No. 1238.

[12] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London Macmillan, 1897) at 85ff.

our case. Their complaint is not with the manner in which British Columbia's legislation is being or might be applied, but with the content of that legislation.

The second of the elements of the rule of law said by the Government to form part of the meaning of that principle—the need for a "normative order"—is of even more limited scope than the first. It was endorsed by the Supreme Court of Canada in a case in which the Court had concluded that every statute that the legislature of Manitoba had enacted since the early 1890s—including statutes relating to the constitution, maintenance and operation of the legislative, executive and judicial branches of government—was unconstitutional because it had been enacted in English only. The Court recognized that, were it to issue a simple declaration to that effect, most if not all of the institutions of government in that province would disappear and a state of legal chaos would result. Not surprisingly, that was not a result that appealed to the Court, which decided instead to suspend its declaration of invalidity for a "reasonable period of time" to give the government of Manitoba time to translate its legislation into French. In support of taking this remedial route, which guaranteed the people of Manitoba the continuing existence of their institutions of government and kept the existing statutory law in place for at least a while, the Court invoked the rule of law, and in particular the notion that the rule of law required a basic level of "normative order". It is clear—and I do not think the tobacco manufacturers are contesting this—that this understanding of the rule of law cannot provide them with any assistance in their attack on British Columbia's legislation. The enactment of that legislation can hardly be said to put at risk the existence of a basic level of normative order in that province. If anything, the situation they confront is one of too much, not too little, normative order.

The last of the three elements of the rule of law that the Government contends comprises the accepted scope and content of that principle in Canada is the requirement that the state be able to provide a basis in law for any action its agents and officials take that threatens individual liberty. In the Government's submission, it is clear that the tobacco manufacturers can derive no assistance from this element either. Their complaint is not that there is no basis in law for the Government's action against them—the bringing of the special kind of lawsuit for which the Act provides—but that they do not like the law that provides the Government with its basis for taking that action.

The second proposition from the above list that requires some elaboration is the third, that relating to the implications of Philip Morris' rule of law arguments for some of the provisions of the *Charter*, notably sections 7 and 15. I limit myself here to the implications of the equality branch of Philip Morris' arguments for the latter of these provisions. Section 15 of the *Charter* has been interpreted by the Supreme Court of Canada to provide a very limited form of protection to the right to equality. Under the analytical framework established in 1999 in *Law* v. *Canada*, the governing authority on section 15, claimants invoking that provision have to establish (a) that the impugned legislation results in differential treatment either because by its terms it creates a formal distinction or because it has a disparate impact on a disadvantaged group; (b) that that differential treatment is based on one or more of the grounds enumerated in section 15 (*e.g*. sex, race, age, etc.) or a ground analogous thereto; and (c) that that differential treatment constitutes discrimination, in the sense that it offends human dignity.[13] The courts have also held—and this is implicit within the *Law* framework—that section 15 can only be relied upon by natural persons.

In essence, the Government's position is that, if the much broader conception of the right to equality advanced by Philip Morris were to be accepted, the limitations on that right as it is expressed in section 15 would be easily circumvented. Under that conception, corporations would be entitled to impugn the validity of legislation, they would be able to do so regardless of the ground on which the differential treatment complained of was based, and without any need to establish that that differential treatment offended human dignity. In fact, section 15 would very quickly become redundant. A conception of equality that would have this effect hardly seems plausible, let alone appealing.

The Government of British Columbia's position in relation to Philip Morris' rule of law based attack was, as Mr. Clark has acknowledged, accepted by Justice Holmes, the trial judge in both of the constitutional actions that they have launched against the 1997 and the 2000 versions of the legislation. By the time this article is published, we will know whether the Court of Appeal of British Columbia has also accepted it. At least to this point, however, the Government's position has prevailed.

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[13] [1999] 1 S.C.R. 497 at para. 88.

II. THE LARGER ISSUE

Having set out in summary form the Government's position on the rule of law arguments advanced by Philip Morris, let me turn now, wearing my academic hat, to a consideration of the larger issue that those arguments raise: whether or not one can use the organizing or underlying principles of our Constitution as independent bases to impugn the validity of federal and provincial legislation. That issue is, of course, raised in a very direct way by Philip Morris' rule of law arguments and I have explained in proposition (6) above, the manner in which the Government has dealt with it in that specific context—essentially on the basis of the existing jurisprudence. I now wish to address it in a more general way—general both in the sense of being concerned about not just one of these principles but all of them, and in the sense of discussing the issue at a level of some abstraction. This issue is obviously a complex one, and one which cannot be dealt with fully in the time remaining to me this morning. But I can, I think, set out in summary form my own views with respect to it.

That summary begins with the observation that, in thinking about this issue, it is important to remember that the list of these organizing principles is a long one. According to recent pronouncements by the Supreme Court of Canada in cases like *Reference re Remuneration of Provincial Court Judges*[14] and the *Quebec Secession Reference*, it includes, at the very least—and in addition to the rule of law—judicial independence, democracy, federalism, protection of minorities, separation of powers, interprovincial comity, and freedom of political expression. That list may become even longer with the passage of time. In fact, as I pointed out in an article I wrote on this issue a few years ago,[15] support can already be said to exist within the body of our constitutional jurisprudence for a number of other principles being included as well, notably the special role of our superior courts and the integrity of the nation state. To ask whether the organizing principles of our constitution can be used as independent bases for striking down legislation is not, therefore, to ask whether one or two or even three such principles can be so used. It is to ask whether a relatively large number of them—at least ten by my count already—can be so used. For that reason alone, the issue

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[14] [1997] 3 S.C.R. 3.

[15] R.M. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2004) 80 Can. Bar Rev. 67.

must be seen to be one not of minor but of major proportions, and to warrant very careful consideration.

The issue of whether these organizing principles of our constitution can be used to strike down legislation must be said to raise issues of fundamental theoretical importance, issues that go to the heart of both our system of democratic self-government and the principle of constitutionalism. One of the features of that system that is clearly engaged by this question is the legitimacy under our constitution of judicial review—that is, the legitimacy of the use by our courts of the power to hold of no force or effect legislation that has been enacted by our democratically elected representatives at either the federal or provincial level of government. As traditionally understood, and as traditionally defended, the legitimacy of judicial review in this country has been grounded in, and seen to be dependent on, a reliance by the courts on some part of the text of what I like to call our capital "C" Constitution—what is now made up of the *Constitution Acts, 1867-1982* and a few other enactments of special constitutional significance such as the *Statute of Westminster, 1931* (such grounding, it is worth noting, being a necessary but not sufficient condition of the legitimacy of judicial review in particular contexts). For the courts to use this power without being able to rely on some textual provision of the Constitution must, on a traditional understanding, be said to be illegitimate, or at least to require a new justification. Such a new justification, I should note, I have not yet seen, either in the growing body of jurisprudence surrounding these organizing principles, or in the academic literature commenting thereon.

It might be thought that this traditional approach to the legitimacy of judicial review would lead inexorably to the conclusion that it is illegitimate for the courts to strike down legislation on the ground that it offends one or more of the organizing or underlying constitutional principles. Such a view would be based on the assumption—a not unreasonable assumption, I might add, at least at first blush—that these principles are derived from sources external to the text of the Constitution. Is that assumption valid? I do not believe that it is. In my view, there is good reason to believe that *some at least of these principles can be grounded, not in considerations that lie completely outside the text of the Constitution, but in that text*. I would give as an example of such a principle that of judicial independence, at least within the superior courts of this country. In my view, so confined, that principle can be said to be implicit in the combined effect of sections 99 and 100 of the *Constitution Act, 1867*, particularly when those provisions are read in light of the

admonition in the preamble of that instrument that Canada is to have "a Constitution similar in Principle to that of the United Kingdom". Read in that light, sections 99 and 100, protecting, as they do, two of the "core elements" of judicial independence, 16 can and should be seen to constitute an attempt by the drafters of the *Constitution Act, 1867* to entrench that principle within our Constitution. (Such a reading of those provisions would make it possible for someone to challenge on the basis of that principle legislation that, for example, required superior court judges to get the approval of a government official before releasing their reasons for judgment in civil cases involving the government. Neither section 99 nor section 100 could be said to speak directly to the obvious problems with such legislation. Nor, for that matter, could sections 7 and 11(d) of the *Charter*.)

The critical point from the standpoint of constitutional theory is that, if the existence of a particular principle can, applying generally accepted principles of constitutional interpretation, be said to be implied by, or implicit within, one or more provisions of the text of the Constitution, then the invocation of that principle as a basis for striking down legislation is legitimate because it is ultimately the text of the Constitution that is being relied upon. By contrast, however, if an organizing or underlying principle cannot be said to be implied by, or implicit within, one or more provisions of the text of the Constitution—as would be true in my view of a principle that is solely derived from the preamble to the *Constitution Act, 1867*—then it cannot be legitimate for the courts to rely upon it, and it alone, to strike down legislation (although it may well be legitimate for the courts to rely upon it for a number of other purposes, including shedding light on the manner in which provisions of the text of the Constitution should be interpreted).

One of the important implications of this way of approaching this question—some elements of which, I should note, can be found in Justice La Forest's reasons for judgment in the *Provincial Court Judges* case[17]—is that it obliges us to ask, not whether any and all of the organizing or underlying principles can be used as distinct bases upon which legislation can be struck down, but whether a *particular* such principle can be so used. In fact, under this approach it is not only unhelpful but confusing and potentially misleading to ask the more generally worded question.

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[16] S. 99 protects security of tenure and s. 100 financial security.

[17] *Supra* note 14.

So much for the theory. What about the practice? Based on the jurisprudence to this point, I think it is clear that our courts—and I would include here the Supreme Court of Canada—are still struggling to come to grips with the question of how the organizing principles of our constitution are to be used. I attribute much of the difficulty they are having to the fact that there is an unfortunate tendency on the part of some of them when they discuss this question to lump all, or at least several, of the principles together, on the apparent assumption that the answer must be the same in respect of all of them. The Supreme Court did this in both the *Reference re Remuneration of Provincial Court Judges* and the *Quebec Secession Reference* (and, I am obliged to confess, in both it asserted, or at least implied, that they could all be used to strike down legislation). But part of the difficulty must be attributed to the fact that there is also an equally unfortunate reluctance to acknowledge and confront the legitimacy issue that the use of these principles to strike down legislation raises. That reluctance, it must be said, is also in evidence in those two references. Only La Forest J., in his minority reasons in the *Reference re Remuneration of Provincial Court Judges*, addresses the issue, and he adopts the same position as I have taken in this paper—that judicial review is only legitimate if it is based on the text of the Constitution. I cannot help but think that, if that issue were addressed more often, the erroneous nature of the assumption that the principles are all of a kind would become apparent, and the jurisprudential picture would become, both for the courts and for us, a good deal clearer.

Fortunately, at least from my standpoint, we now have a growing body of jurisprudence dealing with the use to which *particular* principles can be put. Such a body of jurisprudence exists, for example, with respect to the use to which the rule of law can be put (with the answer generally being, as I noted above, that it *cannot* be used to strike down legislation), another with respect to the use to which judicial independence can be put (with the answer generally—perhaps even consistently—being that it *can* be so used, even when the courts in question are not superior courts).[18] In my view, it is in the process of dealing with claims based on particular principles—as the courts in British Columbia are now doing in the case brought by the tobacco manufacturers against the *Tobacco Damages and Health Care Costs Recovery Act*—that progress is going to be made. And the fact that the courts to this point have shown themselves willing to treat

[18] See *e.g. Mackin* v. *New Brunswick (Min. of Finance)*, [2002] 1 S.C.R. 405 and *Ell* v. *Alberta*, [2003] S.C.C. 35, online: QL (SCC).

two of these principles—the rule of law and judicial independence—very differently means that we might well end up with an approach to this issue that bears at least some resemblance to the one for which I have argued here today.

Conflicts, Choice of Forum, Coordination and Other Issues

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This paper focuses on the logistics, coordination, recognition and enforcement of cross-border litigation in the context of today's global economy. Cross-border transactions between suppliers and consumers have become commonplace and their cross-border nature has become largely transparent.

A typical example of litigation which is likely to arise in this context is the "hypothetical" that was posited in *Compensating Large Numbers of People for Inflicted Harms*[1] by Senior United States District Judge Weinstein:

> "Assume a popular unregulated herbal supplement is being manufactured by companies in many states and countries. Some produce and sell only locally. Others operate nationally and internationally. Distributors use worldwide Internet, television, and other forms of merchandising. Some foreign companies (and their holding companies) sell in very small quantities in each of many states in the United States [and internationally]. Purchases can be made online directly from the manufacturer and in almost any drug store. Brand names are used, but 'The Product' is generic. Telephone, Internet, and credit card orders utilize satellites, and electronic bank transfers settle accounts, mainly through New York, London, Zurich, and Tokyo. Suddenly, there are indications that the product has serious adverse effects."

Disputes are inevitable, yet multilateral international conventions or treaties that govern such litigation are rare. The absence of treaties and conventions is further complicated by the frequency of litigation involving multiple corporate (and government) defendants, some of them multi-national corporations with subsidiary corporations located in various

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[1] 11 Duke J. of Comp. & Int'l L. 165 at 169

countries, and multiple plaintiffs located in different countries, each of them with different rights, protections and litigation options. Where multiple plaintiffs are resident citizens in different nations and they want to combine their litigation efforts, their choice of forum may allow them to gain significant substantive or procedural juridical or personal advantages.

When these complexities are combined with the perspectives emerging from different political, economic, social and religious systems to emerging or new technologies; scientific and medical developments with inherent bio-ethical considerations; and different legal systems and different laws; cross-border litigation is certain to increase in complexity over the next several decades.

There are also new trends emerging which will further change the landscape of cross-border litigation. They include:

1. the use or threat of litigation as an alternative to political action by citizens frustrated by what they perceive as a reluctance of governments to take action to regulate or curtail the effects that huge multinational corporations operating around the globe have on human rights, labour practices, the environment, etc.;

2. the potential of a new Hague Convention to address the issues of assumption of jurisdiction and recognition and enforcement of foreign judgments; and

3. the pre-emptive settlement of claims by defendants who fear the cost and resource drain that large-scale (especially US-originated class action) litigation may have on their enterprise or government.

The balance of this paper is divided into two sections: conflict of laws jurisprudence and large scale litigation, which includes class actions and group litigation. The primary focus will be on the Canadian legal environment, but the nature of the subject dictates that the legal environments of other countries be examined, too, albeit to a lesser degree.

I. CONFLICT OF LAWS JURISPRUDENCE

As this conference's focus is on cross-border disputes, my primary focus in the conflict of laws jurisprudence section will be on issues that arise in international litigation. However, because of the manner in which the law has developed in Canada, I have included a brief review of

interprovincial law[2] because some academic authorities and courts have opined on the applicability of principles used in interprovincial conflicts to international disputes. Accordingly, my discussion will begin by looking at conflict of laws jurisprudence in interprovincial disputes and will then discuss the uneasy application of these principles to international litigation.

Since Canadian law is only half the equation governing cross-border disputes, I have included a brief overview of the comparable principles that exist in the United States, the United Kingdom, and the European Union (EU).

A. Assuming Jurisdiction—Jurisdiction Simpliciter

The Ontario Court of Appeal in *Muscutt* v. *Courcelles* (2002), 60 O.R. (3d) 20 ("*Muscutt*") outlined the development of jurisdiction *simpliciter*. Historically, there were three methods by which jurisdiction *simpliciter* could be asserted against a foreign defendant:

1. consent—this includes the foreign defendant's voluntary consent to the forum, consent by prior arrangement, *e.g.*, a forum selection clause contained in a contract that requires the parties to submit to a particular jurisdiction, or by attornment to the jurisdiction by appearance and defence;

2. presence, *i.e.*, the foreign defendant is present in the jurisdiction; and

3. assumed jurisdiction, which is initiated by service *ex juris*.

The latter of these, service *ex juris*, codified by most provinces in the Rules of Court, specifies when service outside the jurisdiction may be ordered. It is these codified Rules which are now "subject to the principles articulated in *Morguard* regarding the need for a real and substantial connection and the need for order, fairness and judicial restraint": *Muscutt* at page 31.

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[2] My focus will be on the common law, not on the provincial legislation that deals with interprovincial litigation.

1. Jurisdiction *Simpliciter* in Interprovincial Litigation

In 1990, the Supreme Court decided *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 ("*Morguard*"), an interprovincial mortgage dispute. It signaled the first of a number of developments in the principles governing conflict of laws jurisprudence in Canada. La Forest J.'s judgment reviewed the historical principles that gave rise to a reluctance by one state to exercise jurisdiction over matters that take place in another state's sovereign territory (and presumably over its subjects). At page 1095 of the decision he states:

> "Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. [...] This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory."

However, he concluded that the true meaning of comity is more than respect and deference. In his view it is a "necessity in a world where legal authority is divided among sovereign states..." [at page 1096]. Specifically at page 1098 he comments:

> "The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative."

In recognition of this reality, the Court concluded that new principles were required. It determined that a "real and substantial connection" with the forum was necessary before a Canadian court could exercise jurisdiction over a foreign matter. The Court also established that order and fairness to the defendant required that the court act with properly restrained jurisdiction [at page 1104]. The corollary of this development was that other Canadian courts were required to recognize and enforce sister provinces' judgments.

Three years later, in *Hunt* v. *T & N*, [1993] 4 S.C.R. 289, the Supreme Court gave the principle of real and substantial connection constitutional force by holding that the provinces are required to "respect the minimum standards of order and fairness addressed in *Morguard*" [at page 324].

What that meant, however, was not delineated by the Court beyond its finding that the principle was neither rigidly defined nor meant to be rigidly applied. In *Tolofson* v. *Jensen,* [1994] 3 S.C.R. 1022 ("*Tolofson*"), the Supreme Court conceded at page 1049 that the term "real and substantial connection" was "a term not yet fully defined".

The Ontario Court of Appeal has recently provided guidance on what constitutes a real and substantial connection. In *Muscutt* at page 21, the Court summarizes the relevant factors to consider:

1. the connection between the forum and the plaintiff's claim, because every forum has an interest in protecting the legal rights of its residents;

2. a connection between the forum and the defendant, which may arise where it was reasonably foreseeable that the defendant's conduct would result in harm within the jurisdiction or where the defendant has done something within the jurisdiction that bears upon the plaintiff's claim;

3. unfairness to the defendant in assuming jurisdiction;

4. unfairness to the plaintiff in not assuming jurisdiction;

5. the involvement of other parties to the suit, which includes concerns about avoiding a multiplicity of proceedings and the risk of inconsistent results;

6. the Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

7. whether the case is interprovincial or international in nature, the assumption of jurisdiction being more easily justified in interprovincial cases; and

8. comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

As a result of these cases (*Morguard, Hunt, Tolofson, Muscutt*), it seems that there is now a Canadian framework in place for a Canadian court's assumption of jurisdiction in interprovincial litigation. The *Muscutt* decision was recently cited with approval by Justice Bastarache, writing on behalf of three members of the Court, in his dissenting opinion

in *Unifund Assurance Co.* v. *Insurance Corp. of British Columbia* [2003] 2 S.C.R. 63, 2003 SCC 40 at paragraphs 125-127.

2. Jurisdiction *Simpliciter* in International Litigation

i. At Common Law

Morguard and the cases that followed established the constitutional imperative that there be a real and substantial connection between the matter and the forum as the test for establishing jurisdiction *simpliciter* in an interprovincial matter.

Whether or not the *Morguard* principles should be applied more broadly to questions of jurisdiction *simpliciter* in international matters was, until recently, the subject of some debate. J.-C. Castel notes at page 2-4 in the context of applying the test to the recognition and enforcement of judgments that: "The *constitutional* requirement would not seem to apply to foreign judgments but the new rule has been applied to them."

Castel also notes at page 14-2 that: "... Canadian courts have extended the application of the *Morguard* principles to foreign judgments and, in so doing, have eliminated much, if not all, practical distinction between the regard shown for foreign judgments with respect to questions of jurisdiction and that shown for Canadian judgments."

In *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78 ("*Spar*"), the Supreme Court was required, *inter alia,* to consider, in the context of Quebec's Civil Code and a cause of action that occurred in the United States, whether:

> "(a) a 'real and substantial connection' between the action and the province of Quebec needed to be established before a Quebec court could assert jurisdiction over international litigation, and
>
> (b) jurisdiction should be declined on the basis of the doctrine of *forum non conveniens*."

The Supreme Court unanimously confirmed both the lower courts' decisions confirming the jurisdiction of the Quebec courts. In arriving at its decision, the Supreme Court undertook an extensive analysis of the principles of private international law. At paragraph 20 it held that the objective of comity is order and fairness, and that order is the preeminent of these. It then noted at paragraph 21: "The three principles of comity,

order and fairness serve to guide the determination of the principal private international law issues: jurisdiction *simpliciter*, *forum non conveniens*, choice of law and recognition of foreign judgments."

However, in response to the appellants' arguments that the respondents were required to meet the "real and substantial connection" test, the Supreme Court noted at paragraph 51 that:

> "[...] it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context."

The Supreme Court also noted at paragraph 53 that it came to a similar conclusion in its earlier decision in *Hunt*, *i.e.*, that interprovincial litigation principles "should [not] necessarily be subject to the same rules as those applying to international commerce". The Court then specifically stated at paragraph 54: "In my view, there is nothing in these cases that supports the appellants' contention that the constitutional "real and substantial connection" criterion is required [to be applied in an international context] in addition to the jurisdictional provisions [in the legislation]."

However, in the recent case of *Beals* v. *Saldanha* [2003] 3 S.C.R. 416, 2003 SCC 72 ("*Beals*"), the Supreme Court seemed to endorse the application of the *Morguard* test to questions of jurisdiction *simpliciter* in the international context. While the parties in that case had conceded that the Florida court had jurisdiction and the Supreme Court was not, therefore, required to make a decision on the point, Major J., speaking for the majority, indicated at paragraph 17 that the parties' concession of jurisdiction was appropriate: "It was properly conceded by the parties, as explained below, in both the trial court and Court of Appeal, that the Florida court had jurisdiction over the respondents' action pursuant to the 'real and substantial connection' test set out in [*Morguard*]."

This comment, coupled with the readiness of trial and appellate courts to apply the *Morguard* test to international questions of jurisdiction *simpliciter*, seems to have settled the law in Canada in respect of this issue.

ii. Statutory Authority Pursuant to the Hague Convention

As mentioned in the introduction to this section, before the development of the *Morguard* principles (real and substantial connection, order and fairness and jurisdictional restraint) the determination of whether jurisdiction could be assumed over a foreign defendant was determined by the provinces' Rules of Court. Under these Rules, service *ex juris* might be ordered when the subject matter of the litigation was property within the jurisdiction, when there had been a breach of contract within the jurisdiction, when damage had been sustained in the jurisdiction, when a tort had been committed in the jurisdiction and in other, less common circumstances.

When the foreign defendant is located outside of Canada, the rules for service *ex juris* are largely derived from the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, to which Canada became a signatory in 1988, and which came into force in 1989. As of June, 2004, there were 52 member states that were parties to that Convention.

As Castel writes in *Canadian Conflict of Laws* at page 11-26.3, the Convention is intended to provide uniform procedures to effect service of legal documents in a timely manner and to improve mutual judicial assistance.

B. Declining Jurisdiction Doctrine of *Forum (Non) Conveniens*

1. *Forum Non Conveniens* in Interprovincial Litigation

Once a Canadian court has assumed jurisdiction, there is the additional and discrete matter of whether it should exercise its discretion to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. A court may decline jurisdiction on the basis that the action may be more appropriately and justly tried elsewhere.

In *Muscutt*, the Court reviewed the list of factors a court must consider when determining whether it is the most clearly appropriate forum [pages 34-35]:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- contractual provisions that specify applicable law or accord jurisdiction;
- the avoidance of a multiplicity of proceedings;
- the applicable law and its weight in comparison to the factual questions to be decided;
- geographical factors suggesting the natural forum;
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

Although there is some overlap between the factors that a court may consider in its determination of jurisdiction *simpliciter* and in its application of the doctrine of *forum non conveniens,* the two are separate and discrete inquiries. The Supreme Court explained in *Tolofson*, at page 1049: "[The real and substantial connection] test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. [T]hrough the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where ... there is a more convenient or appropriate forum elsewhere."

In summary, there is a two step inquiry for a Canadian court in the context of an inter-provincial matter:

> 1. Can it assert jurisdiction over a foreign defendant where jurisdiction is assumed and initiated by service *ex juris*? To determine this, the court uses the real and substantial connection test.
>
> 2. Should it decline jurisdiction because, as claimed by the defendant, there is a more appropriate forum elsewhere? The Court uses the doctrine of *forum non conveniens* to determine this.
>
> Once the Court takes jurisdiction, there exists a constitutional imperative that the resulting judgment be recognized and enforced by other Canadian jurisdictions.

2. *Forum Non Conveniens* in International Litigation

The doctrine of *forum non conveniens* is widely accepted in most common law countries including Canada (*Spar, Amchem Products Inc.* v. *British Columbia (Workers Compensation Board),* [1993] 1 S.C.R. 897 ("*Amchem*")), the United Kingdom (*Spiliada Maritime Corporation* v. *Cansulex Ltd.,* [1987] A.C. 460 ("*Spiliada*"), *Lubbe* v. *Cape,* [2000] 4 All E.R. 268 ("*Lubbe*")), and in the United States (*Piper Aircraft Co.* v. *Reynolds,* 454 U.S. 235 (U.S.S.C.).

The law governing European member states is somewhat different. In *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, the governing principle is *lis pendens,* not *forum non conveniens.* This means that if the court first seized establishes jurisdiction *simpliciter*, then the matter is at an end. Article 27 specifies:

> 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
>
> 2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

The following discussion focuses primarily on the Canadian law as it pertains to the issue of when a court should decline jurisdiction in favour of the defendant's proposed forum in an international matter.

i. Declining Plaintiff's Choice of Forum Only Done Exceptionally

Although in *Spar* the Supreme Court was specifically considering the application of the *Quebec Civil Code*, it approached the problem by first reviewing the general principles of private international law, including common law and academic commentary. LeBel J. confirmed the Supreme Court's decision in *Amchem*, that the court should decline jurisdiction only exceptionally; that is, the plaintiff's choice of forum should be declined in favour of the defendant's choice of forum in exceptional circumstances. To do otherwise could create uncertainty in private international law. He emphasized at paragraph 81 that "such uncertainty could seriously

compromise the principles of comity, order and fairness, the very principles the rules of private international law are set out to promote."

This accords with the English law. In *Spiliada*, the House of Lords noted at page 476 that where a plaintiff has founded jurisdiction as of right in England, the "court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant."

Contrasting this with EU law, where the court must decline jurisdiction in favour of the court first seized, Canada, United States and United Kingdom law will not always favour the party who won the race to the courtroom.

ii. Proposed Forum must be "Clearly More Appropriate"

In *Amchem*, which preceded *Spar* by almost 9 years, Sopinka J. identified three variables which often mean that there is no single appropriate forum: the increase in the number of multinational (and multiple) defendants; the corresponding emergence of the potential of a large class of plaintiffs residing in different jurisdictions; and the difficulty of pinpointing the place where the transaction giving rise to the action took place.

He concluded at page 912 by stating that in these circumstances "the best that can be achieved is to select an appropriate forum since no one forum is clearly more appropriate than others." He also confirmed that the parochial attitude exemplified by older cases is no longer appropriate and that "courts have had to become more tolerant of the systems of other countries."

He confirms at page 931 that in order to exercise its discretion to decline to hear a matter in the plaintiff's choice of forum, the Court must find that there is a forum that is clearly more appropriate.

In summary, a defendant's application for a stay in proceedings should be granted by the court's exercise of *forum non conveniens* only when the defendant's proposed forum is "clearly more appropriate" than the plaintiff's choice of forum. This is a difficult hurdle because in the context of litigation in a globalized business environment, several different fora may be "appropriate," and the plaintiff's choice carries great weight. This will be illustrated by the cases in the large-scale litigation section.

iii. Factors to Consider in Assessing Forum Non Conveniens

The rule in Canada is that the party seeking to rely on the doctrine must bring an application for dismissal, *i.e.*, the party that is seeking to have the court which has assumed jurisdiction *simpliciter* exercise its discretion to stay the matter must prove that the proposed jurisdiction is clearly more appropriate. However, it seems that Canadian courts have routinely emphasized that the burden will rarely affect the outcome of their determination as this will usually depend on the Court's assessment of the relevant factors: *Canadian Conflict of Laws* at pages 13-12.

In *Spar*, the Supreme Court quotes with approval from the Quebec Court of Appeal decision in *Lexus Maritime* v. *Oppenheim Forfait GmBH.,* [1998] Q.J. No. 2059, online: QL (QJ), which held that the following ten factors were relevant, but not individually determinant:

1. The parties' residence, that of witnesses and experts;
2. the location of the material evidence;
3. the place where the contract was negotiated and executed;
4. the existence of proceedings pending between the parties in another jurisdiction;
5. the location of Defendant's assets;
6. the applicable law;
7. advantages conferred upon Plaintiff by its choice of forum, if any;
8. the interests of justice;
9. the interests of the parties; and
10. the need to have the judgment recognized in another jurisdiction.

Each of these factors has been the subject of extensive commentary and case law. It will be apparent that the factors to consider in an international matter are very similar to those considered in an interprovincial matter.

iv. Forum Shopping

As the House of Lords in *Spiliada* (still the leading English decision on *forum non conveniens*) stated at 465: "Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose."

One forum may give one party a personal or substantive and procedural juridical advantage, and will generally cause its opponent an offsetting disadvantage. Advantages of a certain forum for the plaintiff may include: more favorable limitations periods or time bars; the availability of legal aid or contingency-type fee arrangements; the likelihood of a higher quantum of damages; the possibility of punitive damages; the court's power to award interest; the availability and extent of discovery procedures; and, the availability of class or group litigation actions.

The Supreme Court in *Amchem* discouraged forum shopping and concluded that a defendant or potential defendant has two remedies for countering a plaintiff's attempt to forum shop:

> 1. The defendant may seek an application for a stay of proceedings, which, as discussed above, will be determined by a court's exercise of its discretion using the doctrine of *forum non conveniens*. Procedurally, the defendant will raise this in the forum where the plaintiff brought its cause of action.
>
> 2. Alternatively, the defendant may apply for an anti-suit injunction which may be granted by a domestic court in a foreign suit. Procedurally, the defendant will seek the injunction in the jurisdiction where it claims the action should be heard. If granted, it enjoins the plaintiff from bringing its action in the court of its choice. Although the injunction is an *in personam* remedy, it has the effect of restraining the foreign court, and "therefore raises serious issues of comity" [at page 913]

v. Anti-Suit Injunctions

Justice Sopinka in *Amchem* outlined the circumstances under which a domestic court might grant an anti-suit injunction. He noted that these occasions would be rare, because such an action would be necessary only when the foreign court did not stay the proceedings in its application of

the doctrine of *forum non conveniens* as pleaded by the defendant to the suit. As mentioned earlier, the courts in the United States and the United Kingdom also follow the doctrine, albeit with different results, as will become apparent in the large-scale litigation section of this paper.

After he reviewed *forum non conveniens*, Sopinka J. then set out the law in Canada with respect to anti-suit injunctions. At page 932 he indicates that to maintain comity, a domestic court should consider granting an anti-suit injunction only if:

> "1. the applicant (the defendant in the action) has failed in its attempt to obtain a stay of proceedings, *i.e*., the foreign court has not declined to hear the matter by its exercise of discretion to stay or dismiss the action there; and
>
> 2. the domestic court is alleged to be the most appropriate forum."

If these conditions are met, then a domestic court must consider whether it is either clearly the most appropriate forum, or, if no single forum is clearly more appropriate, whether it is the natural forum (*i.e*., it has the closest real and substantial connection with the action and the parties), in which case it would "win out by default."

As part of this analysis, the Court must, as a matter of comity, take into consideration that the foreign court has itself determined that it is the *forum conveniens, i.e.* it has turned its mind to the doctrine of *forum non conveniens* and has not declined jurisdiction. If the domestic court applies the Canadian *forum non conveniens* factors and finds that the foreign court could reasonably have concluded that there was no clearly more appropriate forum, then that decision should be respected, and the application for injunction should be dismissed.

Where the foreign court's assumption of jurisdiction is contrary to Canadian principles of private international law as embodied in the doctrine of *forum non conveniens*, then the domestic court must consider whether the party whose suit would be enjoined would suffer an injustice if it were deprived of the personal or juridical advantages associated with its choice of foreign court. In other words, would the plaintiff suffer an injustice if the domestic court ordered the anti-suit injunction? The court makes this determination in the context of all the factors, including those previously outlined in *forum non conveniens* and in "real and substantial connection."

The following process can be extracted from Sopinka J.'s summary comments on page 933:

> 1. having considered the advantages of the foreign jurisdiction to the plaintiff bringing the action and any inherent injustice that would arise if it were deprived of that jurisdiction;
>
> 2. and the corresponding disadvantage and injustice (if any) to the defendant of that foreign jurisdiction, then
>
> 3. if the jurisdiction of the foreign court would constitute an injustice, then the assumption of jurisdiction by the foreign court will be inequitable, and the party invoking the foreign jurisdiction can be restrained.

Granting an injunction to prevent such an injustice would not disregard the rules of comity, because "the foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the grounds of comity" [page 934].

vi. Coordination Between Two Fora

In *Amchem*, the Supreme Court discusses the possibility that both jurisdictions refuse to decline jurisdiction as neither is clearly more appropriate than the other and parallel proceedings result. In that case: "... the consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases. [at page 914]."

C. Recognition and Enforcement of Foreign Judgments

To ensure that there is no confusion between what is meant by a foreign judgment, I will use the term "Canadian judgment" for judgments rendered by Canadian courts and "foreign judgment" for judgments rendered by courts outside of Canada.

1. At Common Law

i. Canadian Judgments

As noted previously, jurisdiction *simpliciter* and the recognition and enforcement of judgments are correlatives. This means that a Canadian court must recognize and enforce a judgment rendered by a federal court or by a court in a sister province. This is a constitutional imperative.

ii. Foreign Judgments

As mentioned earlier, the Supreme Court of Canada in *Beals* indicated, albeit in *obiter,* that the real and substantial connection test applies to questions of jurisdiction *simpliciter* in international matters. However, the primary issue in that case was whether the same test governs questions of the recognition and enforcement of judgments in the international context. In this respect, too, *Beals* represents the culmination of a line of Supreme Court of Canada case law.

The Supreme Court noted in *Spar* at paragraph 64 that assuming jurisdiction and recognition and enforcement were separate issues. As the issue before the Court was the former, it declined to rule on the latter: "As this case concerns the initial assumption of jurisdiction by a court, it would be premature to enter into any discussion of the application of the "real and substantial connection test" in respect of the recognition and enforcement..."

In *Canadian Conflict of Laws,* Castel notes at pages 2-4, 2-5: "If the Supreme Court confirms the application of the real and substantial connection test to foreign judgments, thereby permitting the enforcement of foreign default judgments, it would seem appropriate to revise the defences to enforcement in order to safeguard defendants from the particular kinds of unfairness that can arise in crossborder litigation."

The kinds of "unfairness" referred to are well illustrated by *Beals*, where the defendants appealed a judgment awarded against them in a Florida court. The Beals, who were Florida residents, purchased a lot in Florida owned by the defendants for $8,000. They commenced an action in Florida alleging that they were induced by fraudulent misrepresentations to purchase the wrong lot. The Saldanhas and the Thivys, all of whom were Ontario residents, chose not to defend the action

in Florida and, ultimately, a default judgment of USD260,000 was awarded against them.

The Canadian trial judge dismissed the Beals' action to enforce the Florida Court's judgment, holding that the Florida judgment had been obtained by fraud and that public policy precluded its enforcement in Ontario. The Ontario Court of Appeal held that the defences of fraud or public policy did not have any application in this case and that the correctness of the decision was irrelevant to the enforcement of the judgment. There were no newly discovered facts that could not have been discovered prior to the foreign judgment and presented by the defendants had they chosen to appear and defend the action. The defendants were not entitled to relitigate the claim under the guise of an allegation of fraud. There was no public policy reason not to enforce the judgment. Florida was the appropriate court for the determination of the issues.

Among the issues heard on appeal to the Supreme Court were:

- whether Canadian courts should, as a matter of public policy, refuse recognition of a foreign judgment where, on the facts, the judgment does not conform to Canadian views of fundamental justice;

- whether section 7 of the Charter applies to shield a Canadian resident from the enforcement of a foreign judgment;

- whether Canadian courts should give a broader interpretation to the defences of fraud, public policy and natural justice, as raised in *Morguard*, which referred to "fairness to the defendant through fair process" and remedies being available to foreign default judgments in certain cases where public policy issues are raised; and

- whether the failure of the defendants to appear in foreign proceedings stops them from seeking redress for failings in the processes of the foreign court, which ultimately results in a denial of fundamental justice.

The majority of the Supreme Court held at paragraph 19 that the *Morguard* "real and substantial connection" test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments. In coming to that conclusion, Major J., writing for the

majority, discussed the importance of comity and held at paragraph 27 that the doctrine "... must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility." The Supreme Court referred to the judgments in *Morguard* and *Hunt* as follows at paragraph 28:

> "International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in [*Morguard*] and further discussed in [*Hunt*] can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test should apply to the law with respect to the enforcement and recognition of foreign judgments."

The Supreme Court then went on to discuss the application of various defences, commenting as follows at paragraphs 40-41:

> "The defences of fraud, public policy and lack of natural justice were developed before *Morguard, supra* and still pertain. This Court has to consider whether those defences, when applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.
>
> These defences were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defences are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive."

With respect to the defence of fraud, Major J. noted at paragraph 43 that "as a general but qualified statement, neither foreign nor domestic judgments will be enforced if obtained by fraud". He went on at paragraph 51 to draw a distinction between fraud going to jurisdiction and fraud going to the merits of the foreign judgment:

> "... fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment."

With respect to the defence of natural justice, Major J. stated the following at paragraph 59:

> "As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice."

Finally, with respect to the defence of public policy, the majority of the Supreme Court noted that "this defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice." The Supreme Court then noted at paragraphs 75-76 that this defence is narrow in application:

> "The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.
>
> The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason

> that the claim in that foreign jurisdiction would not yield comparable damages in Canada."

Lastly, at paragraph 78, the Supreme Court considered and rejected the argument that enforcement of the foreign judgment in question in *Beals* violated of section 7 of the *Charter*:

> "The appellants submitted that the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy. It was argued that the recognition and enforcement of that judgment by a Canadian court would constitute a violation of section 7 of the *Charter*. The appellants submitted that a *Charter* remedy should be recognized to the effect that, before a domestic court enforces a foreign judgment which would result in the defendant's bankruptcy, the court must be satisfied that the foreign judgment has been rendered in accordance with the principles of fundamental justice. No authority is offered for that proposition with which I disagree but, in any event, the Florida proceedings were conducted in conformity with fundamental justice. The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment. As section 7 of the *Charter* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, I have difficulty accepting that section 7 should shield a Canadian defendant from the enforcement of a foreign judgment."

2. Unilateral Legislation for Recognition and Enforcement of Foreign Judgments

The Uniform Law Conference of Canada (U.L.C.C.), at its annual meeting on August 12, 2003, adopted the draft *Uniform Enforcement of Foreign Judgments Act* (UEFJA) as a Uniform Act and resolved that it be recommended to the jurisdictions for enactment[3]. The UEFJA was

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[3] See http://www.ulcc.ca/en/poam – Proceedings of Annual Meetings, 2003, Fredericton, N.B. Civil Section Documents, Working Group on Enforcement of Foreign Judgments—Report and Revised Final Draft and Commentary as at July 22, 2004.

presented to the U.L.C.C. by the coordinator of the 1999-2000 Working Group, Kathryn Sabo[4].

The following policy choices with respect to foreign judgments are embodied in the UEFJA[5]:

- A specific uniform Act should apply to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.
- The proposed uniform Act applies to money judgments as well as to those ordering something to be done or not to be done.
- The proposed uniform Act applies to provisional orders as well as to final judgments.
- The proposed uniform Act rejects the "full faith and credit" policy applicable to Canadian judgments under the U*niform Enforcement of Canadian Judgments* (UECJA).
- The proposed uniform Act identifies the conditions for the recognition and enforcement of foreign judgments in Canada. These conditions are largely based on well-accepted and long-established defences or exceptions to the recognition and enforcement of foreign judgments in Canada.
- Following on the heels of *Morguard*, the proposed uniform Act adopts as a condition for recognition and enforcement of a foreign judgment that the jurisdiction of the foreign court which has rendered the judgment was based on a real and substantial connection between the country of origin and the action against the defendant.

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4 General Counsel, Private International Law Team, Department of Justice, GOC.

5 http://www.ulcc.ca/en/cls/ – Commercial Law Strategy, Enforcement Law Projects as of June 24, 2003.

3. Multilateral Recognition and Enforcement of Foreign Judgments

Canada currently has two multilateral treaties in place that govern recognition and enforcement of judgments between Canada and the United Kingdom and Canada and France. Most provinces have embodied these and multilateral and uniform legislation now exist between the provinces and France and the UK. For example, in Alberta, the *International Conventions Implementation Act, Part 3,* adopts the *Convention Between Canada and the United Kingdom of Great Britain*.

However, there are interesting developments under way. In accordance with the Decision of Commission I of the 19th Session of the Hague Conference, an informal working group was set up to prepare a text on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a special commission. Subsequently, the informal working group proposed that the objective be scaled down to a convention on choice of court agreements in business-to-business cases and prepared a draft which was discussed by the Special Commission at a meeting in December, 2003. This meeting was a multi-day negotiating session of member states at which each member state's formal position on each of the proposed articles of the draft convention was put forward, the purpose of the session being to further refine the draft text. The result of this meeting was a preliminary draft convention put forward in March, 2004 followed by a more recent draft in May, 2004[6]. A diplomatic conference will be held at some future date to put the draft text to a vote and possibly produce a final text, which would then form a treaty or convention open for signature and ratification. If Canada ratifies the final convention, the U.L.C.C. likely will recommend that uniform legislation be adopted by the provinces.

II. LARGE-SCALE LITIGATION

A. Different Types of Large-scale Litigation

Large-scale litigation (many like claims by similarly situated plaintiffs arising from a similar or common cause of action) is often erroneously thought to be synonymous with class action litigation. However, there are

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[6] See http://www.hcch.net/doc/jdgm_wd110_e.pdf.

three methods (with slight variations on a jurisdiction-by-jurisdiction basis) by which such large-scale litigation can originate:

> 1. **individual actions** whereby multiple plaintiff litigants file claims severally or jointly in either single or multiple jurisdictions, which are then consolidated either by the Court pursuant to their respective procedural rules or by agreement of the parties;
>
> 2. **representative actions** including those where a non-profit organization is formed, named as plaintiff, and then brings the action on behalf of the members of the non-profit. Membership to the organization is usually by subscription, which is often solicited by advertisement; and
>
> 3. **class actions** where a representative plaintiff is appointed by the Court to represent members of a defined class.

All of these methods tend to avoid a multiplicity of actions (post-consolidation), they streamline discovery, they generally allow a single court to hear, acquire the necessary expertise, and adjudicate a matter, and they frequently result in settlements. Unless the details of a case are reviewed, it is often difficult to distinguish between the methods that were originally used to bring the matter before the courts.

There are clearly differences between the three methods: the first requires that all plaintiffs be both known and named as parties to the action; the second allows potential "plaintiffs" with a common cause to join the named group plaintiff once the action is underway; whereas the third requires a class or subclass with common issues to be certified and very specifically defined, and not every plaintiff in a class action needs to be known or named. In other words, under the first two options, plaintiffs must take proactive steps to join the cause, whereas under a class action, once a plaintiff is by definition part of the certified class, they must take proactive steps to opt out of the class if they do not wish to be bound by the decision or the settlement.

A second major difference is the flexibility with which settlements may be made and how damages may be awarded. The first option allows the parties to settle pursuant to their agreement and individual plaintiffs to be awarded damages specific to their circumstances. Class actions generally result in a fixed amount of damages for each class or subclass of plaintiff, and the court must approve any settlement. Of course, there are exceptions to these generalities.

An additional misconception is that class actions are usually mass tort claims. In the United States, where mass tort class action litigation is thought to be rampant, only one of 55 class action litigation cases between 1966 and 1997 before the United States Supreme Court was a mass tort class action (*Amchem* v. *Windsor,* 521 U.S. 591 (1997) an asbestos-related claim)[7]. The other class action cases were securities and consumer cases related to financial losses as a result of unfair business practices, deceptive advertising, etc., employees' rights violations, other civil rights violations, and actions against the Government[8].

B. Are Class Actions Necessary?

1. The Canadian Perspective

In 2001, the Supreme Court discussed the history and function of class actions in *Western Canadian Shopping Centres Inc.* v. *Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 ("*Dutton*"). McLachlin C.J.C. described the general rule in equity that all like persons be joined as parties but concluded that this may not be practical or viable when the number of parties affected is very large. In such cases, the Courts of Equity have long recognized that the right of one or a few persons to sue for themselves and others similarly situated was permitted. She then continues at pages 548-549:

> "The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class

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[7] D.R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action*, 11 Duke J. of Comp. & Int'l L. 179 at 180.

[8] *Ibid.* at 185.

> action offers a means of efficiently resolving such disputes in a manner that is fair to all parties."

2. The American Perspective

In July 2000, the Duke University School of Law and the University of Geneva Faculty of Law held a conference titled: "Debates over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?" ("Duke/Geneva Conference"). About 90 lawyers, academics, judges and law students from over twenty nations participated. Several of the papers given at the conference formed the basis of the Spring/Summer 2001 issue of the *Duke Journal of Comparative and International Law,* volume 11, number 2 (11 Duke J. of Comp. & Int'l L. 157).

In the foreword to that issue, Thomas D. Rowe, Jr.[9], wrote:

> "The sources of injury or threat [to large numbers of people] can vary greatly—a tragedy such as a hotel fire or airplane crash; widespread distribution and use of a drug or other product such as asbestos, tobacco, or Fen-phen; claimed violations of civil or human rights; environmental pollution; and business practices such as alleged price-fixing, misleading statements affecting values of publicly held securities, insurance overcharges, and violation of consumer protection laws.
>
> However parallel the problems, the responses of different legal systems have varied widely among nations, with varying emphases on class actions, group litigation by associations or unions, regulatory enforcement, social compensation schemes, and other approaches. In the United States the class action has for the last third of a century been the most prominent but by no means exclusive mode—and has been a focus of much controversy. Only a few other nations have adopted the class action device even to a limited extent; and in many countries, particularly the civil law systems of continental Europe, resistance to the class action is strong, and responses to widespread-injury problems are sometimes limited. [footnotes omitted]"

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[9] Elvin R. Latty Professor of Law, Duke University School of Law.

In his keynote address to the Duke/Geneva Conference, titled "Compensating Large Numbers of People for Inflicted Harms"[10], Senior United States District Judge Weinstein states that United States courts tend to attract global disputes for four reasons: procedural and jurisdictional rules helpful to plaintiffs, high money judgments, substantive law that favours plaintiffs, and a powerful plaintiffs' bar capable of financing and prosecuting such cases.

3. The European Perspective

In "Multi-Party Actions: A European Approach"[11], Christopher Hodges notes that the usual justifications for the necessity of class actions, *e.g.*, deterring harmful corporate acts, fairly compensating victims for damages, etc., have never been empirically validated in Europe. He claims that European consumer legislation serves a similar purpose and that US-style class actions are simply used to:

> "... leverage large sums of money from a corporation to claimant attorneys through contingency fees "earned" in return for settling a large number of claims of speculative value. Such a settlement may be in the corporation's commercial interests in the United States context as it achieves closure on the potential for multiple individual claims arising over many states for an uncertain period, each with a cost and drain on resources and the risk of maverick jury awards."

Hodges concludes that there is clear disdain for what "many Europeans view as a grossly overheated litigation market" based on "unpredictable potential for arbitrary variation in liability decisions, the potential for very large (again unpredictable and arbitrary) damages awards, and the disproportionate size of the commercial incentive to the plaintiffs' lawyers."

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[10] 11 Duke J. of Comp. And Int'l L. 165 at p. 167.

[11] 11 Duke J. of Comp. & Int'l L. 321 at 322.

4. The United Kingdom Perspective

As I will discuss later, the United Kingdom has adopted a hybrid approach, called group litigation, which straddles the European and US/Canadian positions. It recognizes the need for improving accessibility to, and efficiency of, claims by a large number of similarly situated plaintiffs, but its processes for dealing with these give the managing court much more latitude, because as Lord Steyn of the House of Lords noted at the Duke/Geneva conference[12], "we do not want a litigation-driven society."

C. Class Action Legislation in Canada

In *Dutton,* the Supreme Court cited three important advantages that class actions have over a multiplicity of individual suits: judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis which benefits both plaintiffs and defendants; fixed litigation costs which can be divided among a large number of plaintiffs, which means that the doors of justice do not remain closed to plaintiffs; and efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

There is currently class action legislation in British Columbia[13], Saskatchewan[14], Manitoba[15], Newfoundland[16], Ontario[17], Quebec[18] and Alberta[19]. Additionally, as the Supreme Court noted in *Dutton,* there is common law authority for class action suits.

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[12] *Ibid.* at 344.

[13] *Class Proceedings Act,* R.S.B.C. 1996, c. 50.

[14] *The Class Actions Act*, S.S. 2001, c. C-12.01.

[15] *Class Proceedings Act,* C.C.S.M., c. C-130.

[16] *Class Actions Act*, S.N. 2001, c. C-18.1.

[17] *Class Proceedings Act,* S.O. 1992, c. 6.

[18] *Code of Civil Procedure.*

[19] *Class Proceedings Act,* S.A. 2003, c. C-16.5m as am. by S.A. 2003, c. 42, s. 4.

Plaintiffs in Canada also have the ability to seek joinder and consolidation of litigation.

1. Class Certification

It seems that the most difficult hurdle (and most litigated) that a potential class in Canada has to overcome is obtaining the court's certification of the class. The specific requirements pertaining to certification of a class vary between the various statutory instruments. There are also significant differences between them. For example:

> 1. a defendant in an action in Ontario and BC may only apply to have a class of plaintiffs certified if that defendant is involved in two or more actions. In Alberta, the defendant in any proceeding may do so;
>
> 2. a plaintiff may apply to have a class of defendants certified in Ontario, but neither BC or AB plaintiffs have the option of doing so. In effect, this means that a potential litigant may have to proceed against multiple defendants by name; and
>
> 3. in AB and BC, residents and non-residents are automatically divided into subclasses on the basis of residency. This is not the case in Ontario. As subclasses may opt out or opt in to the class in a different manner than members of a class, this has different ramifications.

For comparative purposes, Appendix 1 outlines the requirements for class certification under the Ontario, British Columbia and Alberta statutes. There are numerous differences between the various Acts as it pertains to how a class action proceeding may commence, who it includes, how residents and non-residents are treated, what the opt-in and opt-out provisions are, etc.

What impact do these differences have? They may create personal or jurisdictional advantages for both plaintiffs and defendants depending on their specific circumstances. This may drive "forum shopping," although it is unlikely that forum shopping within Canada would have the advantages of, for example, different damages quanta.

D. Class/Group Action Legislation Internationally

1. In the United States

The United States has had class action legislation in the form of Rule 23 of the *Federal Rules of Civil Procedure 28 U.S.C.A*. since 1966. However, more than 50 sovereign jurisdictions (federal and state) result in complexities in mass adjudication. There is a constitutional requirement for a jury in class actions[20].

Multi-district litigation can be consolidated pursuant to statute (28 U.S.C. §1407) by either party. This allows lawsuits which originated in both federal and state courts to be collected and assigned to a single court and judge where there are similarly situated plaintiffs. However, this only applies to pre-trial activity, which in most cases is enough, as there is a significant chance of pre-trial settlement.

2. In the United Kingdom

The United Kingdom has no class action legislation, but litigants are permitted to undertake group litigation. As the House of Lords noted in *Lubbe, supra* at page 280, "the conduct of group actions is governed by a recently-developed but now tried and established framework of rules, practice directions and subordinate legislation." Part 19.III of the C*ivil Procedure Rules (Amendment No. 2) 2003* (2003 No. 1242 (L.26)) and the two accompanying Practice Directions (19 and 19B) outline the specific requirements associated with the application of the Rule.

A Group Litigation Order ("GLO") may be made by a court when there is or is likely to be a number of claims giving rise to the GLO issues: Rule 19.11(1). These orders must be approved at the highest level. For example, a Queen's Bench GLO must be approved by the Lord Chief Justice: Practice Direction 19B s. 3.3(1). A group register is then established on which the claims managed under the GLO will be entered: Rule 19.11(2). A single court and judge will "assume overall responsibility for the management of the claims and will generally hear the GLO issues": Practice Direction 19B, section 8.

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[20] 11 Duke J. of Comp. & Int'l L. 165 at 172.

United Kingdom group litigation actions differ from class actions in that plaintiffs must affirmatively opt in to the cause (as opposed to opt out in class actions) and in doing so they agree to be bound by the result (although there are provisions for appeal). Joinder can be accomplished in varying ways, including membership in an association named as the representative group plaintiff. Naming an association as plaintiff means that not each and every member of the affected group/class need be known or named, so this circumvents the opt in requirements for individual plaintiffs.

Group actions have been widely used in medical litigation (blood products, intrauterine devices, human growth vaccine, tobacco, etc.), other personal injury cases, financial cases and environmental cases.

3. In Europe

In the rest of Europe (excluding the U.K.), large-scale consumer disputes are settled differently. In "Multi-Party Actions: A European Approach"[21], Christopher Hodges notes that member states facilitate large-scale consumer disputes by either instituting out-of-court procedures or by creating joint representation action, in which a consumer organization takes action on behalf of consumers who have suffered individual harm caused by the same entity and having a common origin.

Further, *Directive 98/27/EC* permits consumer organizations to apply to courts in fellow member states for an injunction against infringements of consumer trading Directives. Additionally, there are multiple conventions which govern intra-EU issues pertaining to jurisdiction and the enforcement of judgments in civil and commercial matters.

The author concludes at page 327 that:

> "European access to justice and dispute resolution mechanisms represent an approach to economic and social policy that rejects an adversarial approach and excessive or unnecessary transactional costs but favors conciliation at proportionate costs. European policy emphasizes social cohesion rather than an approach stressing the individualistic vindication of personal rights."

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[21] 11 Duke J. of Comp. & Int'l L. 321 at 322.

E. Class Action/Group Litigation and Conflict of Laws Interrelationships

There is a strong interrelationship between class or group litigation and conflict of laws jurisprudence whenever plaintiffs or defendants are located in different jurisdictions. In Canada, the United States and the United Kingdom, case law and legislation supports the availability of a domestic forum for members of the class or group that are non-nationals.

1. In Canada

The three major class action-related cases that have been heard by the Supreme Court are *Dutton*, which involved non-resident foreign investors who suffered damages as a result of debentures purchased to facilitate their immigration application, *Hollick* v. *City of Toronto*, [2001] 3 S.C.R. 158, 2001 SCC 68, which involved damages to Canadian residents allegedly caused by a waste disposal site and *Rumley* v. *British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, which involved residential schools. All of these cases dealt with issues pertaining to the certification of a class, so the relationship between class actions and conflicts of laws cannot be examined in these cases.

The Ontario and BC courts have had occasion to decide cases where the relationship between class actions and conflict of laws was material, however these were in the context of mostly Canadian resident class members. The defendants have been both Canadian and non-Canadian foreign persons.

In *Carom* v. *Bre-X Minerals* (2000), 1 C.P.C. (5th) 62 (Ont. C.A.), leave to appeal refused (2001), 283 N.R. 399 (S.C.C.), the Court held that Ontario's real and substantial connection with the subject matter of the action allowed the Court to take jurisdiction over the matter on behalf of non-resident class members. Further, its class action legislation permitted any person with the right of action regardless of residence to be included as a member of a class.

In *Harrington* v. *Dow Corning Corp* (2000), 193 D.L.R. (4th) 67, 2000 BCCA 605, a case dealing with silicone breast implants, non-resident members formed a subclass. The defendants argued that British Columbia courts could not take jurisdiction over these non-residents because there was no real and substantial connection between them and the forum. For example, they were not resident in British Columbia and they did not receive their implants in British Columbia or from British

Columbia doctors. However, the Court of Appeal concluded that there was a real and substantial connection that allowed the British Columbia court to assume jurisdiction because of the existence of a common issue between the residents and the non-residents.

This was also the finding in *Wilson* v. *Servier Canada Inc.,* (2000), 50 O.R. (3d) 219 (Ont. Sup. Ct.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Ont. Div. Ct.), leave to appeal refused (2001), 276 N.R. 197 (S.C.C.). That case dealt with the drug fenfluramine, which allegedly caused heart problems in those that used it for dieting. Class action proceedings included Canadian plaintiffs in all provinces and one of the defendants was a French corporation. That defendant argued that French law would not enforce the Canadian judgment because France had "blocking legislation" and because it did not recognize class actions. Despite that argument, the Court held that it was up to the plaintiffs to decide where to bring their action and that it had jurisdiction as long as Ontario had a real and substantial connection to the matter. Further, if French law required a retrial of the action in France, this was not a matter with which the Court need concern itself, because it was up to the plaintiffs to weigh the disadvantages thereof.

The Ontario court stressed that the opt-out provisions in their legislation allowed members of a class to opt out so the Ontario courts would not be imposing its jurisdiction on unwilling plaintiffs, whether they are Canadians or foreign nationals: *Wilson, Cheung* v. *Kings Land Development Inc.* (2001), 14 C.P.C (5th) 374 (Ont. Sup. Ct.), leave to appeal refused (2002), 156 O.A.C. 73 (Ont. Div. Ct.).

In summary, it seems that in Canada (or at minimum in Ontario and B.C.), once jurisdiction *simpliciter* over the matter has been established (and *forum non conveniens* declined, if it is raised), then non-resident plaintiffs can be included in the class or subclass if they have a common issue with resident members of the certified class. This probably applies to both Canadian residents and to non-Canadian residents. Whether the non-resident class member's country of residence or citizenship allows class actions seems to be irrelevant.

As discussed earlier, there are two parts to the application of conflicts of law: assuming jurisdiction and recognition and enforcement of judgments. As it pertains to assuming jurisdiction, it seems that the treatment of class actions and individual plaintiffs' actions do not differ in their application of conflict of laws jurisprudence. Recognition and

enforcement of another jurisdiction's class action judgment would follow the same process outlined in Section II, Part C, above.

2. In the United Kingdom

As noted above, group litigation actions are available in the United Kingdom. In *Lubbe, supra,* over 3,000 claimants participated in an action against Cape Plc., an asbestos mining company, alleging that their exposure to asbestos caused them personal injury, and in some cases, death.

The ability of non-residents to be parties to group litigation is similar to that which exists in class actions in Canada and the United States. *Lubbe* dealt with the issue of whether lower courts were correct in their refusal to decline jurisdiction over the matter on the basis of the defendants' *forum non conveniens* argument. It was the defendant's position that South Africa was clearly the *forum conveniens*. It argued that despite the fact that the initial plaintiff was a British citizen resident in England, all of the other 3000 plaintiffs were South Africans citizens resident in South Africa, South Africa was where all of the alleged asbestos exposure occurred, the wholly owned subsidiary that ran the asbestos facilities was resident there, all of the evidence and the witnesses were located there. It is instructive to follow the case through its various proceedings because it deals with both group and the conflict of laws.

In response to the defendants' application for a stay of proceedings of Lubbe's[22] claim, the Queen's Bench judge agreed that South Africa was the natural forum for the trial of the action, and the proceedings were stayed pursuant to his exercise of discretion using the doctrine of *forum non conveniens*. An appeal by the plaintiffs was allowed. The Court of Appeal found that the defendants had not shown that South Africa was "clearly and distinctly the more appropriate forum" (also the Canadian test for *forum non conveniens*). Leave to appeal to the House of Lords was refused. Hundreds of new claims by South Africans using British solicitors poured in.

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[22] A British citizen and resident.

The defendant applied to stay all of the proceedings, including that of the original plaintiff, on the grounds of *forum non conveniens*. The lower court gave direction to consolidate the proceedings into a group litigation action. The stay was heard and the lower court again concluded that South Africa was clearly and distinctly the more appropriate forum. A second appeal was launched and this time the Court of Appeal agreed and described the factors that pointed to South Africa as the appropriate forum as "overwhelming." It concluded that South Africa had both the real and substantial connection[23] between the claim and the forum and that public interest and group litigation action considerations including expense and convenience also pointed to South Africa. Further, the Court of Appeal noted that despite the fact that legal aid and contingency fee arrangements might not be available as the plaintiffs' had argued, the South African courts are held in high repute and that legal aid may become available. Leave to appeal to the House of Lords was allowed.

How then did the House of Lords justify its conclusion that the *forum conveniens* was England? The Court held that *Spiliada* applied, *i.e.*, the defendant's proposed forum be clearly and distinctly more appropriate than England, and that the court must be satisfied that there is another forum of competent jurisdiction and that the case may be tried more suitably for the interests of all the parties and the ends of justice in that jurisdiction.

It also held that the plaintiff's allegations about the absence of legal aid or other form of financial assistance, including the availability of contingency fee arrangements, was not determinative. The House of Lords concluded that [at pages 286-287]:

> "The proper approach therefore is to start from the proposition that a claimant who is able to establish jurisdiction against the defendant as of right is entitled to call upon the courts of this country to exercise that jurisdiction. So, if the plea of *forum non conveniens* cannot be sustained on the ground that the case may be tried more suitably in the other forum ... the jurisdiction must be exercised—however desirable it may be on grounds of public interest or public policy that the litigation be conducted elsewhere and not in the English Courts."

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[23] The Canadian test for jurisdiction *simpliciter*.

In summary, the presence of non-resident plaintiffs in a United Kingdom group litigation action does not alter the conflict of laws rules that exist in England; as long as a single plaintiff is a resident citizen that is entitled to bring an action in England as of right and there is no clearly and distinctly more suitable forum elsewhere (and this seems to be a difficult hurdle to overcome), then a group litigation may be heard in England.

3. In the United States

A well-known United States case that involved non-resident class litigants arose when over 2000 residents of Bhopal, India lost their lives and over 200,000 were injured as a result of a lethal gas leak from a chemical plant operated by Union Carbide Corporation (UCC) and the Union of India (India). There has been individual and class action litigation underway since the 1984 disaster occurred.

The first big wave of class action litigation was consolidated in the United States District Court for the Southern District of New York; there were 145 claims representing about 200,000 plaintiffs. The defendant, UCC, had argued that the United States court should stay the consolidated action on the grounds of *forum non conveniens*.

In a 63 pages opinion, District Judge Keenan's judgment (*Re Union Carbide Corporation Gas Plant Disaster at Bhopal,* 634 F.Supp. 842 (S.D. N.Y., 1986)) agreed with the defendant and dismissed the lawsuits before him on three conditions: that UCC consent to the jurisdiction of the courts in India, that it would satisfy any judgment ordered by those courts provided that they "comport with the minimal requirements of due process, and that the UCC be subject to discovery under United States civil procedure legislation. UCC appealed the conditions attached to the dismissal of the law suit and succeeded: *Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, (1987), 809 F.2d 195 (C.A.) (*"Re Bhopal*"). An action was then brought by India in the District Court of Bhopal and the Supreme Court of India approved the settlement agreement in 1991.

District Judge Keenan's judgment [at page 845] considered the doctrine of *forum conveniens* and the "touchstone" cases of *Gulf Oil* v. *Gilbert* (330 U.S. 501, a 1947 decision of the United States Supreme Court) and *Piper Aircraft* v. *Reynolds* (454 U.S. 235, a 1981 decision of the United States Supreme Court). He notes that *Piper* established that the Court is advised to determine first whether the proposed alternative forum

is "adequate," and it should then consider relevant public and private interest factors. In *Piper,* the court concluded that the presumption that a plaintiff's choice of forum was entitled to great deference was decreased when the plaintiff was foreign. This was the footing upon which the Court then proceeded. The fact that 9 of approximately 200,000 plaintiffs were United States citizens was determined by the Court to be insignificant.

The adequacy of the alternative forum comprises a number of factors, including the defendant's amenability to the alternate forum. The relative attractiveness of the United States system to foreign plaintiffs is not a factor unless the alternative forum's remedy would likely be so "clearly inadequate or unsatisfactory that it is no remedy at all" [page 846]. The Court concluded that the defendant was amenable to the alternate forum and that India's legal system did not constitute a much less adequate system.

Having met the first part of the test, the Court then turned to the consideration of the private interest considerations, which include sources of proof, access to witnesses, possibility of view. All of these factors weighed heavily in favor of India as the preferred forum. In its consideration of the public interest concerns, the Court considered the administrative burden that would arise if litigation were handled at places other than their place of origin, that jury duty should not be imposed on people in a community that has no relation to the litigation and that there is a public interest in having localized controversies decided at home. Again, the Court held the public interest balance was heavily in favor of India as the proper forum. It considered both the sheer size of the proceedings, which it concluded would unfairly tax the American legal system, and the interests of the Indian government and its citizens were significantly greater than those of the United States.

4. Comparing Canada, the United Kingdom, and the United States

Assuming that there are resident national plaintiffs living in each of Canada, the United States and the United Kingdom, where could or should a class or group litigation action be undertaken? Should there be a single action worldwide or should each country's plaintiffs bring an action in their own courts?

i. Inclusion of Non-resident Plaintiffs

There is a paucity of Canadian cases that have expressly dealt with the issue of whether to hear a class or representative matter where the majority of the plaintiff class members are non-residents. In *Interclaim Holdings Ltd.* v. *Down,* [1999] 253 A.R. 119, 1999 ABQB 892, Kent J. of the Alberta Court of Queen's Bench struck the representative portions of a Statement of Claim in a class action decision on the grounds that judgment, if granted, would not be binding on the foreign parties, because all of the named and unnamed plaintiffs were not residents of Alberta. This, she reasoned, would mean that the principle of *res judicata* may not apply and that such a plaintiff could then sue elsewhere. This decision was appealed to the Alberta Court of Appeal, which decided on February 4, 2004, in light of certain factual changes and of the Supreme Court's intervening decision in *Dutton*, that the matter should be reheard by the Court of Queen's Bench[24].

It is interesting to compare *Lubbe* and *Re Bhopal*, in which *forum non conveniens* was argued, with differing outcomes. In both cases, virtually all of the plaintiffs were non-resident citizens, the cause of action occurred abroad, the facilities were run by local nationals, and the witnesses, etc. were located abroad. What then accounts for the different outcomes?

The House of Lords declined to follow *Re Bhopal* in *Lubbe* stating at page 287 that determining "where a case ought to be tried on broad grounds of public policy" is not a factor for consideration in the United Kingdom because the court "is not equipped to conduct the kind of inquiry and assessment ... that would be needed if it were to follow that approach" and because these interests are not determinative of whether justice will be better served in one forum over the other. As noted previously, public policy factors figured prominently in the United States Court's decision.

The other determining factor seems to have been that the role of the parent company was much more significant in the view of the English court than in the view of the United States court. In *Re Bhopal*, the United States Court agreed with defendant UCC's submission that their role as the United States parent company was minor, and that in all respects it had distanced itself from the Indian operation. Although this was also the case

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[24] (2004), 44 C.P.C. (5th) 42, 2004 ABCA 60.

in *Lubbe,* the House of Lords still attached great weight to the parent company's duty vis-à-vis the plaintiffs.

In *Wilson, supra,* the Ontario Supreme Court opined on whether the corporate veil should be pierced and the parent company held directly responsible for the actions of its subsidiary company in a class action suit. The Court held that the usual stringent test of piercing the corporate veil would apply, but that the protection provided by the corporate veil was not absolute [paragraphs 21-22].

ii. Plaintiff Compensation Comparisons

It is very difficult to empirically compare plaintiff compensation across jurisdictions, even where the plaintiffs are seemingly similarly situated. For example, in a mass tort class action, the precise facts that gave rise to the cause of action are often different, the tort systems, while similar, are not identical, there are differences in the plaintiffs' countries delivery and payment for medical services, there are different costs of living which affect the amount of settlement, there are different fee structures for counsel, etc. However, there is one example of very recent class action litigation that may be used for comparison purposes; diet drugs containing fenfluramine.

In the United States, about 4 million potential class members existed, and a court-approved settlement was reached in *Brown* v. *American Home Products Corporation Diet Drugs,* 2000 U.S. Dist. LEXIS 12275[25].

The comparable class action in Canada is *Knowles* v. *Wyeth-Ayerst Canada Inc.,* (2001) 16 C.P.C. (5th) 330; online: QL (OJ) (Ont. Sup. Ct.). The Court there also approved a proposed settlement. In that decision Cumming J. discussed the settlement agreement in the context of the already agreed upon United States settlement agreement.

He noted at paragraphs 38-39:

> "[the United States decision] provides one standard by which to measure the proposed settlement of the Canadian class action at hand… There are, of course, significant differences in the sizes of the class in each country, the delivery of and payment for medical

[25] An appeal from that decision was dismissed at 2003 U.S. Dist. LEXIS 23717.

> services, and in respect of the two tort systems (for example, there is the potential for adverse cost awards in Canada, there is a cap on general damages in Canada and there is a greater risk of punitive damage awards in the United States)."

Justice Cummings then outlined additional factors which meant that the settlement amounts could not be readily compared. These factors included differences in the costs of notice and administration being handled differently, the different treatments of the settlement trusts, secondary opt-provisions which only exist in the United States, and the respective finality of the settlements. In summary, he concluded at § paragraph 48 that: "Considering the totality of the respective settlements, in my view the Canadian settlement is comparable to the settlement in the United States."

As these are very recent cases and one of the few instances where the facts are somewhat comparable, it might be possible to conclude from them that settlements which, in the case of class actions must be approved by the Court, will be comparable between Canada and the United States, as the criteria used by both courts is that the settlement must be fair, reasonable and in the best interests of the class.

Despite the fact that these diet drugs were sold worldwide, I was unable to find any litigation underway in other countries, including the United Kingdom.

iii. Global Class Action vs. Country-by-Country Class Action or Group Litigation

Although it seems that truly global class actions are possible (see for example, holocaust victims access to compensation funds established by Germany, Austria, Swiss banks, etc.), most class actions seem to be brought by plaintiffs on a country-by-country basis, even where the plaintiffs are seemingly similarly situated, for example, blood products, silicone breast implants, and fenfluramine drugs.

Perhaps this is explained by the differences that were outlined above. For example, there is different legislation and common law pertaining to tort actions and environmental legislation varies from country to country as does securities legislation. Damages awards, which are generally awarded to members of a class do not generally account for the differences that would exist in the cost of living, medical care, etc., that plaintiffs residing in different countries would enjoy.

CONCLUSIONS

As borders become less of an impediment to the conduct of business and personal affairs, there is a recognition by governments and courts that there needs to be standardized doctrines for the recognition and enforcement of foreign judgments. The Supreme Court of Canada in *Beals* is the most recent Canadian example. The forward movement of the Hague Conference is another. In the realm of class actions, for some time now there has been a propensity to settle large-scale class actions. While in Canada this does not stem from a concern about the unpredictability of jury awards as it does in the United States, there is a significant cost to massive class action litigation which itself can be daunting. Secondly, class actions are being used as a vehicle to correct or regulate apparently abusive behaviour by multinational corporations or lax regulation of those corporations by government.

There are some concerns that these trends raise. How does large-scale international litigation affect the relationship that each citizen has with the administration of justice in his or her country? Although it is not a subject for discussion every day, people still assume that there will be a strong system of dispute adjudication when it is needed. Indeed, it is the certainty that such a system exists that comforts the business community and the public. One of the biggest problems that most judicial systems are struggling with is the rising costs of taking a case before a judge for adjudication. That problem is magnified in complicated medical malpractice or environmental cases where the technical nature of the evidence and the likely involvement of multinational corporations result in vast pretrial document and oral discovery. For that reason, large, multijurisdictional class actions seem like the answer. However, what effect does that have upon the person who may be a party to such an action? Take a father in a small town in Alberta who was prescribed a drug which has caused him serious and permanent health problems. As a result, his family is suffering significant emotional and financial strain. A class action is commenced in Toronto. For one reason or another, the action is unsuccessful and there is no recovery. The family who has been counting upon the action is not in the courtroom to see how the case is proceeding. They have no realistic contact with their lawyer. All they know is that this is part of the "justice system" and that justice system has done them wrong. Would it not have been preferable to have the trial in Edmonton or Calgary? The connection with the lawsuit would have been real and their understanding of why the action was unsuccessful would have been more informed. Remoteness

may result in a loss in a citizen's connection with the justice system which in turn becomes disdain for the judicial system. Surely, it is necessary for a strong judicial system that people feel that they are a part of that system. I am not suggesting that this is a reason to avoid or abandon multijurisdictional actions. It is a cautionary note that the judges and others must keep in mind in managing and trying such cases.

The second concern is the potential devaluation of the class action. According to the Rand Institute for Civil Justice, a survey of over 1000 class actions in the United States in the late 1990s showed that the average compensation received by members of a class ranged from $6 to $1500 in consumer actions and $6400 to $100,000 in mass tort actions[26]. Are big class actions being seen by members of the public as a way to make a few dollars rather than to redress real wrongs?

Finally, to the extent that class actions try to change regulatory policy, is that really the role of the courts? To take an extreme example, an article by Adam Liptak in the New York Times[27] talks about recently successful actions and the concern it raised with the Bush administration. One of the examples was an order by a judge in New York that Iraq pay $1 billion to soldiers captured and tortured in the first Gulf War. The article quotes a State Department lawyer, William H. Taft IV, as saying that such orders are not only costly but potentially damaging to American foreign policy. Who is right or wrong in that case is not the point. It raises the question of whether the courts should be regulating (or, in the example, arguably setting foreign policy) when this is properly the role of city councils, legislatures and parliaments. Or, is the court obliged to do so in the absence of governmental action?

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[26] "Class Action Dilemmas: Pursuing Public Goals for Private Gain".

[27] August 3, 2003.

Appendix 1 – Class Action Summary

Requirement	**Ontario** ***Class Proceedings Act*, S.O. 1992, c. 6**	**B.C.** ***Class Proceedings Act*, R.S.B.C. 1996, c. 50**	**Alberta** ***Class Proceedings Act*, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4**
How is a plaintiff's class proceeding commenced?	One member of the class may commence a proceeding on behalf of the members of the class (s. 2(1)). Any party to a proceeding against two or more defendants may make application for a class of defendants (s. 4)	One member of a class resident in BC may commence a proceeding on behalf of a class (s. 2(1)).	One member of a plaintiff's class may commence a proceeding on behalf of the class (s. 2(1)) and request certification of the class (s. 2(2)). A representative plaintiff is appointed by the applicant (s. 2(2)) or by the Court (s. 2(4)) and is certified. That plaintiff may be a non-profit organization (s. 2(6)).
How is a defendant's class proceeding commenced?	A defendant to two or more proceedings may, at any stage of the proceedings, make an application for certification of a class and a representative plaintiff (s. 3)	A defendant to two or more proceedings may, at any stage of the proceedings, make an application for certification of a class and a representative plaintiff (s. 3)	A defendant may, at any stage of the proceedings, make an application for certification of a class and of a representative plaintiff (s. 3(1)).

Requirement	**Ontario** ***Class Proceedings Act*, S.O. 1992, c. 6**	**B.C.** ***Class Proceedings Act*, R.S.B.C. 1996, c. 50**	**Alberta** ***Class Proceedings Act*, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4**
Conditions for class certification	The Court shall certify if: the pleadings or notice of application disclose a cause of action; there is an identifiable class of two or more that comprise a class of plaintiffs or defendants; the claims or defences raise common issues; a class procedure is preferable for resolving the common issue and there is a representative plaintiff or defendant who would fairly represent the class (s. 5(1))	The Court must certify the class if the conditions are met: the pleadings must disclose a cause of action; there is an identifiable class of 2+ persons, whose claims raise a common issue; the class proceeding is preferable for the fair and efficient resolution of common issues; a representative plaintiff exists to fairly and adequately represent the class (s. 4(1)).	Before certifying a class, the Court must be satisfied that: the pleadings must disclose a cause of action; there is an identifiable class of 2+ persons, whose claims raise a common issue; the class proceeding is preferable for the fair and efficient resolution of common issues; a representative plaintiff exists to fairly and adequately represent the class (s. 5(1)).
Subclass certification	Where the class includes members have claims or defences that are not shared by all class members and the court determines that these interests should be separately represented, then a representative plaintiff or defendant of that subclass may be certified (s. 5(2)).		Where there are subclasses (class members who, in addition to the common issues shared with all members of the class also have unique common issues with other members), a representative plaintiff of the subclass may also be certified (s. 7(1)).

Requirement	**Ontario** ***Class Proceedings Act*, S.O. 1992, c. 6**	**B.C.** ***Class Proceedings Act*, R.S.B.C. 1996, c. 50**	**Alberta** ***Class Proceedings Act*, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4**
Non-residents	N/A	Class comprised of BC residents and non-residents must be divided into subclasses along those lines (s. 6(2)).	Where a class comprises residents and non-residents, they will be divided into subclasses (s. 7(3)).
Opting out and in	Any member of a class may opt out of the proceeding in the manner specified in the certification order: s. 9. [There are no special provisions for foreign residents].	A resident of BC may opt out of the class: s. 16(1) A non-resident of BC may opt into the subclass that exists for non-residents: s. 16(2)	A resident of Alberta may opt out of the class: s. 17(1)(a). A non-AB resident must opt into the subclass that exists for non-residents: s. 17(1)(b), (d) and s. 7(3). Persons that have been granted leave to opt out may conduct their own case: s. 17(4).
When is a class proceeding the preferable procedure for the fair and efficient resolution of common issues?	N/A	Whether the question of law or fact that is common predominates over the questions that affect only individual members of the class; whether class members have a valid interest in individually prosecuting separate actions; whether the	Whether the question of law or fact that is common predominates over the questions that affect only individual members of the class; whether class members have a valid interest in individually prosecuting separate actions; whether the

Requirement	**Ontario** ***Class Proceedings Act*, S.O. 1992, c. 6**	**B.C.** ***Class Proceedings Act*, R.S.B.C. 1996, c. 50**	**Alberta** ***Class Proceedings Act*, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4**
		claims have been the subject of other proceedings and whether other means to resolve them are less practical and efficient; and whether there would be greater administrative difficulties in a class than would exist otherwise (s. 4(1)).	claims have been the subject of other proceedings and whether other means to resolve them are less practical and efficient; and whether there would be greater administrative difficulties in a class than would exist otherwise (s. 5(2)).