DODGING THE ISSUE: ACTIVISM IN THE SUPREME COURT OF CANADA

By Daved M. Muttart, Ph.D.

The Newfoundland and Labrador Court of Appeal's judgment in *Newfoundland (Treasury Board) v. N.A.P.E.*[1] charged that the Supreme Court of Canada was becoming increasingly and inappropriately activist. The high Court dismissed the appeal and declined any comment on the activism issue.[2]

In 1988, the government of Newfoundland and Labrador agreed to pay its female health workers on par with its male health workers. Under the agreement, women would receive equal pay for work of equal value. But in 1991, the government passed the *Public Sector Restraint Act*[3] which deferred the pay raise in favour of the female workers for three years and extinguished the arrears. The government's excuse for the perpetuation of the pay inequity was a serious fiscal crisis. Not surprisingly, the union sued to enforce the pay equity agreement claiming violation of the *Charter*'s equality rights provisions.

The case raised the following issues that go to the essence of the extent to which our society is willing to implement its stated ideals of all-inclusive fairness:

- Under what circumstances can government infringe *Charter* equality rights?
- What evidence did the government have to adduce to support the infringement?
- Does the *Oakes* test[4] need to be modified to require an analysis of whether the impugned provision offends the separation of powers doctrine?

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[1] (2002), 221 D.L.R. (4th) 513, 220 Nfld. & P.E.I.R. 1, 657 A.P.R. 1, 103 C.R.P. (2d) 1, 2003 CLLC 230-019, [2002] N.J. No. 324 (QL), 2002 NLCA 72.

[2] [2004] 3 S.C.R. 381.

[3] S.N. 1991, c.3.

[4] In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Court held that to gain the benefit of s. 1 of the *Charter*, the government had to show that the impugned legislation addressed a "sufficiently importation legislative objective" and that, at a minimum, the objective related to concerns which were "pressing and substantial". The substance of the impugned law had to be "rationally connected to the objective". It could "impair the right no more than is reasonably necessary to accomplish the legislative objective, i.e. impair "as little as possible". The government action had to be proportional to its objective.

I will first describe the course of the litigation, then discuss the debate over the appropriate level of judicial activism. Two empirical studies of the current level of activism in the Supreme Court of Canada will be described. I will then critique the Court's failure to uphold the *Charter*'s equality rights and note the insubstantial evidence which the Court accepted as proof of the government's fiscal "emergency". I will conclude with a summary of the Court's treatment of the separation of powers doctrine.

At first instance, the Arbitration Board held that the rollback legislation infringed the equality rights protected by s.15 of the *Charter*. It declined to apply the saving provisions of s.1 of the *Charter* because it held that the government had failed to establish that it had considered less dramatic measures. On judicial review, Justice Mercer upheld the finding that s.15 was breached but decided that the rollback was justified under s. 1 of the *Charter*. The union appealed.

Not content with the already high profile of the case, Justice Marshall, on behalf of a unanimous Newfoundland Court of Appeal, charged that the Supreme Court's jurisprudence under s.1 of the *Charter* fuels the criticism that the judiciary is "actively entering the field of policy-making in its *Charter* applications beyond any tolerable levels sustainable under the Separation of Powers Doctrine.[5] He continued:

> While it would overly dramatize the importance to democratic society of advertence to the Separation of Powers to hold up the *spectre of the bloodshed* in which the Doctrine evolved, it is no histrionic foresight to draw real potential for heightening unease over *undue incursions* by the judiciary into the policy domain of the elected branches of government, going beyond those contemplated by s.1 justification in unintended disharmony and conflict with the Doctrine.
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> The seeds of this potential are already evident in the unease that has frequently been expressed over undue incursions into the public policy field in *Charter* applications. Despite protestations to the contrary, *it has to be acknowledged there is an air of legitimacy to many of these complaints.*[6]

This is a remarkable, even startling, departure of the usual deference which lower courts display to the highest Court in the land. It indicates that the activism critique is reaching crisis proportions. To the extent that "there is an air of legitimacy" to complaints of activism, an air of illegitimacy is starting to surround the Court.

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[5] *Newfoundland v. N.A.P.E.*, (2002) 221 D.L.R. (4th) 513; (2002) 220 Nfld. & P.E.I.R. 1; (2002) 103 C.R.R. (2d) 1 (Nfld. C.A.), para. 342.

[6] *Newfoundland v. N.A.P.E., ibid.*, paras. 342, 364, 365, 639, 648 (emphasis added).

The Newfoundland Court of Appeal's decision received attention in the national press with headlines such as "Judicial activism has gone too far, court says"[7] and "Top court puts judicial activism on trial".[8] The controversy was heightened by a complaint by former politician John Crosby over a letter by Newfoundland Chief Justice Wells which had noted that the Court of Appeal's decision was only the opinion of Justice Marshall.[9] Crosby felt that the Chief Justice's letter had undermined Justice Marshall's independence and refused to let go of the issue even after the Canadian Judicial Council rejected his complaint.[10]

Activism in the Supreme Court of Canada

In the Supreme Court of Canada, Justice Binnie, who delivered the unanimous decision for a seven-person bench, completely ignored the gauntlet thrown down by the Newfoundland Court of Appeal. There is no mention of "activism" in his reasons. What then are the parameters of the issue advanced by the Court of Appeal but avoided by the Supreme Court?

Criticism to the effect that the Supreme Court of Canada is too activist originates in several quarters. In the public press, it is not uncommon to see headlines such as "Top court pursuing activism, experts say",[11] "Supreme Court says judges can ride herd on politicians",[12] and "Guess what, all judges are activists".[13] Writing in *The Next City* magazine, Rory Leishman railed:

> Regardless of what legislators intended in enacting the *Charter*, the Supreme Court of Canada has renounced judicial restraint and now routinely usurps the constitutional authority of the legislative branch of government. In the process, the Supreme Court undermines freedom and the rule of law. ... No one can be free in a state ruled by a dictator who flouts the rule of law, even if that dictator masquerades as a judge.
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> Policy-making judge-politicians have no regard for rules fixed and announced beforehand; instead, they lurch from one inconsistent ruling to another... At a

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[7] K. Makin, *The Globe and Mail* (December 12, 2002), A1.

[8] K. Makin, *The Globe and Mail* (June 2, 2003), A7.

[9] K. Makin, "Wells rejects interpretation of ruling" *The Globe and Mail* (December 13, 2002), A1.

[10] K. Makin, "Old foes Crosbie and Wells square off over judges' rights" *The Globe and Mail* (January 7, 2003), A1, J. Crosbie, "Out of line", *The Globe and Mail* (January 7, 2003), A13, K. Makin, "Crosbie takes aim at judicial council" *The Globe and Mail* (May 2, 2003), A10, and K. Makin, "Judicial body rejects Crosbie call for change", *The Globe and Mail* (June 20, 2003), A8.

[11] K. Makin, *The Globe and Mail* (November 13, 2003), A16.

[12] K. Makin, *The Globe and Mail* (November 7, 2003), A1.

[13] A. Hutchinson, *The Globe and Mail* (January 9, 2003).

> conference of leading Canadian lawyers convened last April by York University's Osgoode Hall Law School to mark the *Charter*'s 16th anniversary, ... Professor Jamie Cameron [stated] "There is a lack of any principle to explain patterns of activism or deference in the past year", she said, "I can't make heads nor tails of them from one case to another."[14]

The above quote cogently sums up the critique: the Court is acting outside its proper constitutional role and its decisions are as changeable as the swirling wind instead of being based on a constant standard. If a learned professor cannot discern any unifying principle, maybe there is none. And if there is none, maybe the local pundit's solution will be just as efficacious as that of a high court judge.

Complaints that the Court is too activist are also made in academic publications. For example, Christopher Manfredi concluded that the Court:

> [H]as shown little restraint in building up its own powers of judicial review or in asserting its own pre-eminent authority over the development of *Charter*-related constitutional principles.[15]

This passage concentrates on the usurpation critique. Other writers lace other issues in with this critique. For example, Professors Morton and Knopff write:

> In a dazzling exercise of self-empowerment, the Supreme Court has transformed itself from an adjudicator of disputes to a constitutional oracle that is able and willing to pronounce on the validity of a broad range of public policies. ... More often than not, [judges] make up the law as they go along. ... Liberal democracy works only when majorities rather than minorities rule, and when it is obvious to all that rulings majorities are themselves coalitions of minorities in a pluralistic society.[16]

On the surface, this is the usurpation critique combined with a call for more democracy. The charge of judges making up the law as they go along echoes Leishman's

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[14] R. Leishman, "Legislators for Life" *The Next City* (Fall 1998), p. 34. For Professor Cameron's paper, see J. Cameron, "The Vagaries of Review at the Supreme Court of Canada", *Canada Watch*, Vol. 6 (October 1998), online: http://www.yorku.ca/robarts/projects/canada-watch/html/vol_6_4-5-6/index.html.

[15] C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001) at 196. Manfredi continues that "[w]hile it may be appropriate for the Court to be final in defining fundamental constitutional principles (a proposition which is debatable), it is less clear that it should be final in determining the political and policy consequences that flow from those principles.

[16] F.L. Morton & R. Knopff, *The Charter Revolution & the Court Party*, (Peterborough, Ont.: Broadview Press, 2000) at 9, 34 and 149. See also D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183.

quote of Professor Cameron. But a complete reading of Morton and Knopff leads to the conclusion that they are at least as critical of the contents of the Court's decisions as of the means by which these decisions are reached. Without putting too fine a point on it, Morton and Knopff would prefer a shift to the right.[17] Allegations of activism must always be tested to ensure that the real criticism is not a departure from the critic's political agenda.[18] As well, mixing criticism of the merits with criticism of judicial activism, provides the Court with an easy answer to its critics.[19] Regrettably, this answer obscures the importance and urgency of the activism critique.

Supporters of the Court point out that our democratically enacted constitution requires the Court to insist that the provisions of the constitution be upheld and respected by all levels and organs of government. The Court clearly has a role in the interpretation of the constitution in general and the *Charter* in particular. As the Justices are fond of reminding us, the *Charter* was our idea, not theirs. Furthermore, the Court itself was created by a democratically elected Parliament. From the moment the *British North America Act* was passed, it was plain that courts were expected to strike down legislation from time to time as part of their "supervisory function".[20] Allan Blakeney, who when he was Premier of Saskatchewan, was part of the negotiations which brought the *Charter* into being, was recently asked whether he would prefer his constitution "living" or "dead" responded:

> I am not a fan of the doctrine of original intent. A bill of rights and a charter of rights is an organic document that must be interpreted in accordance with the temper of the time.[21]

However, as Manfredi notes, all of this requires balance. Judicial review may be an indispensable key element of liberal constitutionalism, yet:

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[17] See for example Morton & Knopff, *ibid.*, at 25-26 where they name the Canadian Civil Liberties Association, feminists, the Charter Committee on Poverty Issues, Gay rights advocates, the Canadian Prisoners' Rights Network, and the Canadian Committee on Refugees as members of the "Court party".

[18] See A.C. Hutchinson, "Judges and Politics: An Essay from Canada" (2004) 24 *Legal Studies* 275-279.

[19] See for example, C. Schmitz, "Activism Critics Posing Threat to Judicial Independence: Dubé" *Lawyer's Weekly*, (1999) Volume 19, #16, P1.

[20] See P.J. Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80 Can Bar Rev 376, P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. Law Rev. 87. For overall reviews of judicial review, see K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 35-51, and P. Monahan, *Constitutional Law,* 2nd ed. (Toronto: Irwin Law, 2002) at 23-24 and 138-141.

[21] Quoted by D. Saunders in "Would you like your constitution 'living' or 'dead'" *The Globe and Mail* (February 21, 2004), F3.

> The paradox of modern liberal constitutionalism lies in this: if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits. ... The paradox is that judicial enforcement of rights in the name of liberal constitutionalism may destroy the most important right that citizens in liberal democracies possess, i.e. the right of self-government.[22]

Nevertheless, each individual has a right to be governed in accordance with the constitution, and it is the courts who must uphold that constitution. In other words, there is no simple solution; the issue of activism must be constantly managed. Too much activism may be as deleterious to constitutional government as too little.

Activism: Empirical Investigations

The level of activism in the Supreme Court of Canada can be measured both quantitatively and qualitatively. Qualitative analyses require substantial judgment on the part of the investigator. For example, I noted that there were eighteen cases in 2003 where it was open to the Court to show activism or restraint. In seven cases, the Court showed restraint.[23] In eleven cases the Court was activist.[24] Activism and restraint were distributed along a continuum: at the activist end of the spectrum, *National Trust v. H & R Block* saw the Court impose its own policy in direct opposition to that clearly expressed by a competent legislature. At the restrained end, *Authorson* required the Court to exercise powerful self-control in the face of high-handed and unfair Parliamentary treatment of war veterans. Still activist but very much in the middle of the continuum, *Doucet-Boudreau*, merely facilitated enforcement of a perfectly legal order. Similarly, *Law Society v. Ryan* required only minimal self-discipline to prevent judicial interference with an administrative tribunal. The remaining fourteen cases were scattered along the continuum.

The foregoing analysis of the Court's 2003 jurisprudence indicates a balance of activism and restraint. Usually the Court stays within bounds, but occasionally it

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[22] C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, (Toronto: McClelland & Stewart Inc., 1993).

[23] *Allen v. Alberta*, [2003] 1 S.C.R. 128, *Dr. Q v. College*, [2003] 1 S.C.R. 226, *Law Society v. Ryan*, [2003] 1 S.C.R. 247, *Bell v. Employees*, [2003] 1 S.C.R. 884, *Authorson v. Canada*, [2003] 2 S.C.R. 40, *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, and *R. v. Blais*, [2003] 2 S.C.R. 236.

[24] *Goudie v. Ottawa*, [2003] 1 S.C.R. 141, *Miglin v. Miglin*, [2003] 1 S.C.R. 303, *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, *Figueroa v. Canada*, [2003] 1 S.C.R. 912, *Beals v. Saldhana*, [2003] 3 S.C.R. 416, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003] 3 S.C.R. 371, *National Trust Co. v. H & R Block*, [2003] 3 S.C.R. 160, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, *R. v. Powley*, [2003] 2 S.C.R. 207.

appears to stray over the line. It has required me to exercise a substantial amount of judgment as to what did, and did not, constitute activism. Quantitative analyses attempts to remove judgment from playing a role. One such study is described in the following paragraphs.

In 2003, Sujit Choudhry and Claire Hunter conducted a comprehensive analysis by building on two earlier studies on judicial activism from 1984 to 2002.[25] They analyzed the Court's judgments since the advent of the *Charter* on a quantitative basis. Their results show that the Supreme Court's overall level of activism, measured as the rate by which it strikes down government legislation, has remained at about thirty-six percent. However, once the *Charter* has been violated, the Court is becoming progressively less differential.

Choudhry and Hunter's data set required that the *Charter* claimant had to be seeking the nullification of a statutory provision. They studied three measurements: overall government win rates in *Charter* cases, win rates on cases turning on the interpretation of section one of the *Charter*, and win rates on statutes which could have been protected by section 33 of the *Charter*. In their model, the more often the government won, the less activist was the Court. Statute nullification, particularly when restricted to *Charter* jurisprudence, hardly comprises the entire universe of judicial activism; nevertheless it is a very useful proxy. Choudhry and Hunter found that the overall government win rate varied between a high of eighty three and a low of twenty-five percent. Overall, the success rate was approximately sixty-four percent. The rates fluctuated widely from year to year with no discernable trend emerging. Choudhry and Hunter graphed their results on a yearly basis. Had their government win rate been graphed in five year increments as in the graph below, the consistency of the Court's overall activism would have been more apparent.[26] Interestingly, this government win rate persists when measured as a function of the number of sections in issue (the measurement preferred by Choudhry and Hunter) and the number of cases before the Court.

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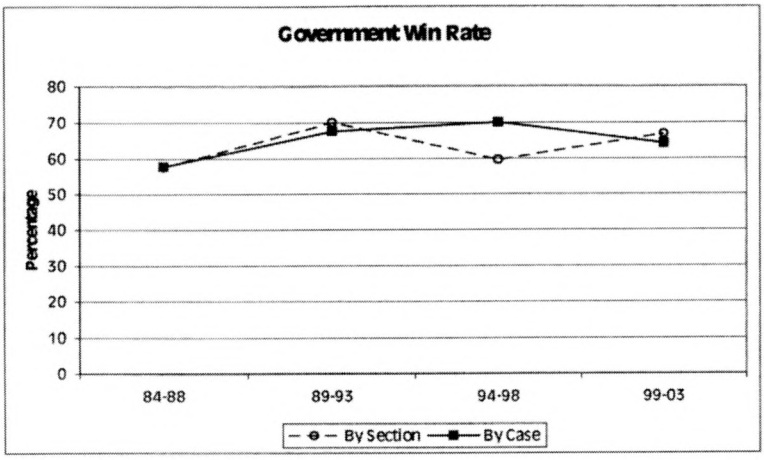
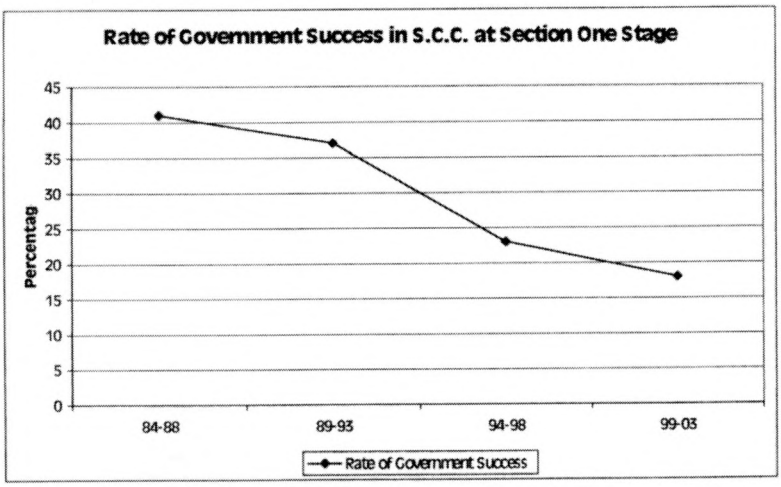
[25] S. Choudhry & C.E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. N.A.P.E.*" (2003) 48 McGill L. J. 525. Claire Hunter is now clerking at the Supreme Court of Canada.

The earlier studies were by F.L. Morton, P. Russell & M. Withey and by J. Kelley. For a published summary of Kelley's work, see J.B. Kelley, "The Supreme Court of Canada's Charter of Rights Decisions, 1982-1999" in Morton, *supra* note 16, p. 496. See also F.L. Morton, P.H. Russell & T. Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992", (1996) 5 N.J.C.L. 1, and J.B. Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 O.H.L.J. 625.

[26] The extension of the data set to include 2003 required the addition of cases for 2003: *Siemens v. Manitoba*, [2003] 1 S.C.R. 6, *Trociuk v. British Columbia*, [2003] 1 S.C.R. 835, *Ell v. Alberta*, [2003] 1 S.C.R. 857, *Figueroa v. Canada*, *supra* note 24, *R. v. Clay*, [2003] 3 S.C.R. 735, *R. v. Malmo-Levine/R. v. Caine*, *supra* note 23, *R. v. S.A.B.*, [2003] 2 S.C.R. 678, *Nova Scotia v. Martin/Laseur*, *supra* note 24. This work was done by my student Andrew Halteh under my supervision.



This steady consistency does not obtain once the *Charter* has been violated. When the data updated by Choudhry and Hunter is expanded to include 2003[27] and combined into five-year segments, the following graph is obtained:



[27] See *ibid.* It should further be noted that the conclusion I arrived at is contrary to the conclusion Choudhry and Hunter arrived at. Additionally, Halteh pointed out that Choudhry and Hunter's reliance on the data from 1996 was particularly misplaced as it constituted only four impugned sections from one case. It should be noted that the trend in the graph obtains whether or not the 2003 data is added in. I am grateful to Choudhry and Hunter for providing me with their original data which facilitated the production of the above graphs.

The graph above measures the government win rate as a function of the number of sections in issue; the downward trend is even more pronounced if measured as a function of win rate per case.

The above graphs show that the Court is persistently active in approximately thirty-five percent of the cases which come before it. This is consistent with the more qualitative analysis of the Court's 2003 jurisprudence. Most interestingly, from the perspective of the separation of powers between the judicial and legislative branches, the Court increasingly prefers its judgment to that of the legislature once it has concluded that legislation is contrary to the *Charter*.

Are equality rights important?

Despite its 1988 agreement which acknowledged the inequality of the pay scale *vis à vis* its female and male workers, the government attempted to deny that its 1991 rollback violated the *Charter*'s equality provisions. The Supreme Court, like the courts below, had little difficulty in ruling to the contrary, forcing the government to argue that there was good reason to uphold the continued inequality under section one.

As described in the following section, the Court accepted the government's evidence that it was under grave financial pressure and that the treasury could not afford the pay raise the government had promised the female workers. This satisfied the *Oakes* requirement that the government establishes a pressing and substantial legislative objective. The Court took only one sentence to decide that cutting pay was a rational way of dealing with the government's budgetary crisis. The Court also had little difficulty in determining that delaying the pay raise was a proportional reaction to the fiscal crisis or that the salutary effects for the province of the delay outweighed the deleterious effects for the affected health workers.

Justice Binnie reviewed the Court's jurisprudence dealing with the fiscal restraints on the provision of *Charter* rights, a topic to which I will return when the Doctrine of the Separation of Powers is discussed. He concluded that a situation of fiscal crisis such as the government faced in this case constituted an emergency. The government's exceptional response in rolling back the pay equity raise was permitted in light of "the exceptional crisis".

With all due respect, this analysis, like almost all of the literature in this area, misses the point. If the real issue is equality, the real issue is the differential wage scale between male and female workers. There is no *a priori* reason why the employer's wage costs have to rise in order to implement equality. The inequality could have been eliminated by *reducing* the pay of men as easily as it could have been by increasing the pay of women. Furthermore, it is the male members of the union, who

participated in establishing the impugned wage-scales, who must share in the responsibility for the unequal wage scales in the first place. Why not reduce the pay of the male health workers? There was no good reason why the women had to bear an inequitable share of the burden of the fiscal crisis. After all, the Court acknowledged that the intent of the *Public Restraint Act* was to pay less to women (and therefore more to men) for work of equal value.[28]

In describing the background to the legislation, the Court followed the framework established in *Law v. Canada*.[29] Equal pay for equal work was acknowledged to be necessary for the affirmation of human dignity. The effect of the Act in reinforcing the inferior status of women was acknowledged. The appropriate comparators, the male health workers, were paid according to their contractual entitlement. If the men could be so paid, why not the women? If the fiscal crisis was dire, why was a pay cut not imposed on the men as it was on the women? A pay cut on the male workers would not have contravened the *Charter*. In short, while lip service was paid to the equality of women, this value was not deemed worthy of any sacrifice being made by any other sector of society.

Is the evidentiary bar too low?

Since the Constitution and the *Charter* in particular constitute the highest law in the land, one could be excused for thinking that it would be necessary to advance cogent evidence in support of any justification to violate it. As the *Globe and Mail* reported, the Court's decision in *Newfoundland v. N.A.P.E.* stands for the proposition that "*Charter* rights can be violated".[30] What then was the evidence of the emergency proffered by the government and should it have been sufficient?

The evidence proffered by the government seems to consist entirely of oral and written statements filed in the Newfoundland legislature.[31] The reasons for judgment do not refer to any evidence under oath. The Court accepted the overall measures adopted by the legislature as corroboration of the severity of the crisis.[32] As such, the evidence of emergency was substantially less informative than the extrinsic evidence proffered in *Re Anti-Inflation Act* which included statistics and economic

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[28] Para. 34.

[29] [1991] 1 S.C.R. 497. See paragraphs 39 et seq.

[30] K. Makin, "Charter rights can be violated, top court rules" *The Globe and Mail* (October 29, 2004), A11.

[31] See paras. 7, 26, 56, 60.

[32] See paras. 61-62.

[33] See *Re: Anti-Inflation Act (Canada)* [1976] 2 S.C.R. 373, 386 et seq.

analysis.[33] The sufficiency of the evidence filed on the Anti-Inflation reference was roundly criticized as being insufficient.[34] Furthermore, the Court's reliance on budgetary estimates may be misplaced as these are often manipulated for political purpose.[35]

Although the Court refers to a decline in federal transfer payments as being the cause of the provincial financial crisis,[36] it failed to address the responsibility of the federal government to ensure that its cost-cutting measure did not have discriminatory effects, The Court should have analyzed whether the federal government's action in reducing transfer payments led to the violation of the *Charter* rights of the female healthcare workers. There was no evidence of financial crisis at the federal level.

The Court will not receive better evidence unless it insists upon it; it has an obligation to force governments to demonstrate a good reason before being allowed to violate the *Charter*. Surely, at some point during the years it took to decide this case, there was time for the government to compile its allegations into a sworn affidavit. Witnesses could have testified before the Newfoundland Arbitration Board. The Board, effectively the court of first instance, was not satisfied that the government had demonstrated the unfeasibility of less drastic or less unfair means of dealing with its fiscal problems.[37] The courts should have been equally dissatisfied.

A stake of *Oakes* puts to rest the spectre of bloodshed

Although it sidestepped the activism issue, the Supreme Court did address the doctrine of the separation of powers. In essence, Justice Binnie re-iterated the *Oakes* test as including an element of deference.[38] The extent to which the courts are required to reverse or sustain legislative and executive actions is mandated by the Constitution. The specific limits of court-reversal is governed by section one of the *Charter*. Thus *Newfoundland v. N.A.P.E.* preserves the status quo ante of the case law.

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[34] See for example, P.W. Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 U.T.L.J. 386 and E.P. Belobaba, "Disputed "Emergencies" and the Scope of Judicial Review: Yet another Implication of the Anti-Inflation Act Reference" (1977) 15 O.H.L.J. 406.

[35] The ongoing underestimate of the federal surplus is a notorious example. See S. Chase & S. Tuck, "Goodale Announces $8.9-billion Surplus: Critics assail Ottawa for poor forecasting, leaving tax cuts on back burner" *The Globe and Mail* (November 17, 2004), A4.

36 See para. 59. The federal government was, of course, not a party but the issue is still worth adverting to.

[37] Para. 17.

[38] *Supra* note 1.

However, the judgment does moderate some of the Court's more adamant statements respecting the primacy of *Charter* rights. For example, in *P.E.I. Judges*, the Court had stated that a measure whose sole purpose is financial can never be justified under section one.[39] *Singh* had also placed rights considerably above financial cost considerations.[40] In 2004, the Court was prepared to acknowledge that the health of the treasury is the "golden goose on which all else relies".[41] The fiscal crisis meant that the government had to not only balance "rights versus dollars", but to balance rights against the entire spectrum of social services it wanted to offer its citizens.[42]

This does not mean that equality rights litigation is a thing of the past. The Court expressed support for its decision in *Nova Scotia v. Martin* which had required the provincial government to provide compensation for chronic pain syndrome.[43] It also expressed support for *Eldridge* which had required the annual expenditure of $150,000 to provide for sign language interpretation.[44] However, the Court did not cite the cost of its ruling in *Martin* nor the fact that the annual cost of sign language interpretation is now more than four times what it had estimated.[45] *Eldridge* is thus an example of a ruling based on unsatisfactory information, an example which should have given the Court pause before ruling on an evidentiary record which would ordinarily have been "a matter of serious concern".[46]

Conclusion

While Justice Binnie's analysis of the concerns expressed by the Court of Appeal respecting the separation of powers is convincing, the Court's failure to address the issue of activism is unsatisfactory. The issue of judicial activism should be a regular subject of discourse in a liberal constitutional democracy. The level of judicial activism requires constant adjustment.

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[39] *Re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3, paras. 283, 284.

[40] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 218-220.

[41] *Newfoundland v. N.A.P.E*: para. 75.

[42] *Ibid.*

[43] Paras. 64 and 97: *Nova Scotia v. Martin, supra* note 24.

[44] *Newfoundland v. N.A.P.E* paras. 83-84 referring to *Eldridge v. British Columbia* [1997] 3 S.C.R. 624.

[45] The figure for the 2003 fiscal year was $631,603 while the estimated cost for 2004-2005 is $690,975: personal correspondence with Larry N. Austman, Senior Policy Analyst, Strategic Policy and Research Division, Ministry of Health Services, (Province of British Columbia).

[46] *Newfoundland v. N.A.P.E.*, para. 56.

The Court's failure to insist that the government produce sworn evidence to satisfy its clear onus under section one of the *Charter* is also disappointing.

Likewise troubling is the Court's unwillingness to insist that governments choose non-discriminatory means of dealing with fiscal crises. The *Charter* would seem to have mandated that both males and females have their contracted-for wages reduced. The Court should not have countenanced the reduction of female wages only.