

# Policy Dialogue

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# SIPP

The Saskatchewan  
Institute of  
Public Policy

Policy Dialogue

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If you would like to comment  
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to say to the public policy  
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## DIRECTOR'S NOTES

### Making a Difference in the Policy Community

BY GREGORY P. MARCHILDON, DIRECTOR, SIPP



On Sept 1<sup>st</sup> of this year, I was appointed Director of SIPP. I am delighted to once again be back in an organization with which I have long had an affiliation. I was a member of the original board of directors; later, I enjoyed a wonderful year at SIPP as a policy fellow. I am not only looking forward to working with old colleagues but I am excited to be in an institution which operates at the interface between policy research and actual decision-making.

As many of you know, SIPP's funding partners, including the University of Regina, the University of Saskatchewan, and the provincial government, have endorsed the idea of SIPP becoming part of the new Johnson-Shoyama Graduate School of Public Policy. The main impetus for this decision is the recent memorandum of agreement signed by the presidents of both universities stating their intention to turn the School into a provincial institution by July 1, 2008.

Generally it takes many years for a new policy institute to make its mark, but SIPP has made a real difference to the policy community in the province since its establishment just a few years ago in 1998. During the next year, my job will be to build on SIPP's major achievements and ensure that they become a significant part of what we hope and expect will become one of the most unique and dynamic policy centres in the country. Through these changes, we at SIPP hope to serve our partners, our stakeholders, the province, and the country even more effectively. ∞

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## LETTERS

### In Response to “Ideological Purity and Real World Pragmatism”

Much like Ken Larson I am a farmer and also a supporter of the concept of a Canadian Wheat Board (CWB). However, Mr. Larsen’s statement that “the CWB has a significant financial benefit to western Canada’s farmers” is possibly misleading. The various academic studies usually cited to support such claims have problems: one has admitted to have “computationally intractable empirical results,” another is criticized for “structural assumptions that were not supported by academic literature,” etc, but most importantly, none are thoroughly understandable by this farmer and probably most other farmers. In response to these types of issues, the CWB board of directors mandated Dr. Richard Gray in 2000-01 to develop a benchmarking process that was to be “subject to intense review through external input...to objectively and critically review ongoing CWB performance...in order to give producers better information [and to] allow the CWB management and directors to monitor and improve performance.”

### Recognition of Thomas K. Shoyama

I was pleased to see the recognition you gave to Tom Shoyama in the Spring 2007 issue. He made an important contribution to public affairs in Saskatchewan as a public servant. He was one of the most delightful and interesting people I ever had the pleasure of knowing.

He had a clear understanding of the distinctions to be made between the role of the politician and the role of the public servant and discussed the subject on occasion with then Premier T.C. Douglas. On one occasion while I was employed with the Economic Advisory and Planning Board, the subject came up during a meeting with him. He said to me, “Right now, I am your boss. So I ask you the questions. You want to go into politics some day. The day may come when you ask me the questions.”



*Photo credit: Neil Douglas*

Disappointingly, this benchmark was only used once (2000-01) and only for Hard Red Spring Wheat, though it did show positive returns. A study authored by myself has extended this analysis to a 5-year period and expanded it to include durum, feed wheat, soft white wheat, feed barley, and malting barley. The results overall are quite disappointing.

The conclusion I have come to, and believe that producers have expressed in the recent barley plebiscite, is that while the idea of a CWB may be sound, many of us are not convinced that the current incarnation of the CWB actually “works” as well as it claims.

Richard Pedde  
Indian Head, SK

(See “Canadian Wheat Board Performance Benchmarking,” Pedde, Western Centre for Economic Research, University of Alberta)



*Photo credit: Saskatchewan Archives Board*

Many years later, while I was a Member of Parliament, I went to a meeting of a House of Commons Committee of which I was a member. Who was one of the witnesses appearing before the Committee? None other than Tom Shoyama as a senior federal official. We had a good laugh as well as exchanging hearty greetings. During the committee meeting, I asked him some questions and he answered them. For the first and only time in our long acquaintance, we addressed each other as “Mr. Shoyama” and “Mr. Burton.”

It is entirely fitting that his name is included in the name of the Graduate School of Public Policy.

John S. Burton

# MULTICULTURALISM MEETS “REASONABLE ACCOMMODATION”

## Is There a Limit to Cultural Pluralism?

BY JOHN D. WHYTE, SENIOR POLICY FELLOW, SIPP

*In legal analysis, analogies can be helpful. But the Supreme Court's borrowing of “reasonable accommodation” from employment law in a case dealing with the cultural rights of a minority has turned out badly.*

“Reasonable accommodation” is a legal term—a term of art, one might say—from employment and human rights law. But, recently, it has also become a political phrase expressing the notion that immigrants to Canada should adjust their cultural practices in order to be less markedly different from the majority of Canadians. As a legal term it connotes a duty on employers to accommodate employees with disabilities and employees practicing religion-based restraints. As a political phrase it connotes the social responsibility on members of minorities to abandon at least some of the visible markers of their identity. How did the concept of reasonable accommodation turn from being a shield against disregard for difference to a sword by which to champion social conformity?

Under anti-discrimination laws, employers are required to make reasonable efforts to enable persons living with restrictions and disabled workers to be employed. This includes special training, reduced hours, and providing both sites for rest or therapy and special aids. In fact, the burden on employers to accommodate employees’ limitations can be considerable, with limits on this duty mainly arising only when the cost to the employer is not in scale with the size of the enterprise. Certainly, the added managerial burdens of accommodation, or other employees’ resentments, do not usually defeat a worker’s claim for workplace changes that allow him or her to keep working.

In 1997, the Supreme Court of Canada was faced with a *Charter of Rights* claim that the failure of British Columbia hospitals to provide signing to deaf patients was a breach of those patients’ *Charter* equality rights. The Court agreed there was a significant discriminatory effect on deaf patients in not being able to effectively communicate with health care professionals about their conditions. The Court then had to apply section 1 of the *Charter* and decide whether this discriminatory effect was a reasonable limit on patients’

equality rights. In answering that question it considered the cost implications of signing in light of the employment concept of reasonable accommodation. It said, “[T]he government has not made a reasonable accommodation of the [claimants’] disability. In the language of human right jurisprudence, it has not accommodated needs to the point of ‘undue hardship.’”

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*The Court's rejection of the school authority's arguments seems perfectly sensible but what is hard to fathom is why the Court, in deciding there were no compelling risks that justified the kirpan ban, saw this as the same question as whether employers or governments should be compelled to overcome discriminatory effects on workers when the cost of doing so is not unreasonable or undue.*

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This importation of employment law into the application of the *Charter's* section 1 is not surprising. The surprise came, however, in 2006 when the Court handed down its decision in *Multani v. Commission Scolaire*. There the Court had to consider whether a school authority's ban on a Sikh boy carrying a kirpan (a small dagger) on school premises violated his *Charter*-protected religious freedom. Again, the Court readily decided there was a *Charter* violation and then turned to the question of whether this violation of his right was reasonable. The Court at that point said that deciding whether restriction on religion-based dress and other practices was like applying the necessary



*“Reasonable accommodation has become the rallying cry for those who are uncomfortable with conspicuous differences on the streets, in pre-natal classes, on soccer fields, and in polling booths.”*

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accommodation test in employment cases. It wrote, “The analogy with the duty of reasonable accommodation is helpful to explain the burden arising from the minimal impairment test with respect to an individual.” The Court went on to say that the school authority’s concerns that the kirpan acts as both symbol and instrument of violence was an overwrought interpretation of the kirpan’s place in the Sikh religion and of the actual effect of kirpans being worn. The Court’s rejection of the school authority’s arguments seems perfectly sensible but what is hard to fathom is why the Court, in deciding there were no compelling risks that justified the kirpan ban, saw this as the same question as whether employers or governments should be compelled to overcome discriminatory effects on workers when the cost of doing so is not unreasonable or undue. In other words, the Court came to a sound conclusion but purported to adopt a standard of assessment relating to undue hardship on employers when what it was actually deciding was whether the state’s case for restricting religious liberty was rooted in a reasonable social assessment.

Of course, there is nothing either remarkable or regrettable in a Court engaging in loose exposition. After all, judges write lengthy judgements and not every part of them will pass the scrutiny of obsessive critics. But what has been unfortunate about this case is the introduction of the notion that in deciding what cultural differences a state, or its population, should allow it is useful to see this as a matter of reasonable accommodation. Predictably, this linkage has not led to the idea that only if the difference in cultural practice and dress imposes undue costs can the state begin to think of imposing restraints. Instead, the more obvious idea of reasonable accommodation has arisen so that it is demanded of immigrants that they act reasonably by which is meant that they be more like the majority. Such is the insidious effect of the reasonableness standard; it is measured not in terms of actual harms or tolerable deviations but in terms of conforming to widely practised modes of behaviour.

Sadly, this is exactly what has happened. Reasonable accommodation has become the rallying cry for those who are uncomfortable with conspicuous differences on the streets, in pre-natal classes, on soccer fields, and in polling booths. Not surprisingly, the advocates of this censoring form of reasonable accommodation have recourse to moral claims. They say that stark manifestations of cultural difference lead to loss of social cohesion and diminish social capital and, in any event, these practices represent the oppression of

women—and children—living in minority communities. It is not clear how we have come to be certain of either consequence, but the debate is animated by these beliefs.

Quebec, under more intense pressure with respect to the practices of its Islamic community (perhaps because Quebec’s distinct French identity is felt to be both more defining and more vulnerable), has created the Consultation Commission on Accommodation Practices Related to Cultural Difference under co-chairs Gerard Boucher and Charles Taylor. Public consultation invariably seems a sound practice in a democracy, but one can expect from this process considerable push back against the quietly assumed virtues of multiculturalism. Already this process has triggered the claim that exclusive jurisdiction over immigration be recognized for Quebec on the ground that immigrant-driven pressure for strong multicultural and intercultural accommodation will weaken Quebec’s traditional cultural identity.

Ontario, too, in the current general election, has become gripped by the question of the limits of cultural pluralism through its debate over appropriate sectarian recognition by the state.

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Canada is a state founded on pluralist accommodation, and it is not surprising that it has become a leading practitioner of the politics of marrying ethnic diversity with political stability. But this feat is not easily sustained. There are bound to be periods of sharp misgiving over policies of recognition and empowerment of minority ethnic and cultural communities. We seem to be in such a period. While the Supreme Court of Canada can hardly be charged with producing the current period of debate, it seems to have given this debate its rhetorical energy. ∞

# NOT JUST ANY LAW WILL DO

## Questions for Alia Hogben

BY PATRICIA W. ELLIOTT, ASSISTANT PROFESSOR, UNIVERSITY OF REGINA SCHOOL OF JOURNALISM

*When the Ontario government decided to accept religious law in family arbitrations, a “little bunch of immigrant women” stood up and said no. In April, after nearly three years of debate, the government backed down. Alia Hogben is executive director of the Canadian Council of Muslim Women.*

**Canada’s legal system already allows for private arbitrations to be settled in a variety of ways. Why the alarm?**  
Yes, but with Canadian law. That was the crux.

**How did the debate begin?**

There was a specific case between Ontario and a US state that led to a clause stating any law could be applied under the *Ontario Arbitration Act*. Some Muslims started to say we could bring in what they called Sharia—our Council stayed away from that word—to settle family arbitrations.

**How was this opening created?**

Although the *Arbitration Act* was designed primarily for commercial disputes, lawyers use it all the time to settle family issues. But they use it with Canadian law. The new clause said it could be the laws of Timbuktu, it could be Hindu laws, laws from anywhere, even made up laws—any law that the two parties agree to.

**How would this affect family arbitrations?**

For example, in most Muslim laws, maintenance after marriage only exists for a few months after marriage breakdown. Also, there’s no such thing as a matrimonial home that belongs to both parties. Generally speaking, children are seen as belonging to the father’s family. But it was nothing to do with Muslims. It was about protecting equality rights for all religious women.

**Wouldn’t there be safeguards?**

You would just register the arbitral award in the court. Nobody oversees it, nobody checks it, unless somebody challenges it. And although both parties must agree to the law used, we know Muslim women have a tendency to put their own rights last.

**What was your main concern specific to Muslim law?**

Muslim law is extremely complex. It is applied in dozens of countries. There is no one common law, and there are variations and schools. Even two countries using the same school of law may have completely different understandings of it. Which law was going to be applied, and how? And where would be the oversight?

**Wouldn’t the judiciary provide oversight?**

The whole point of private, legally-binding arbitration is that the courts don’t get involved. In any case, judges wouldn’t want to touch it with a ten-foot pole. How would they make an assessment of it? Judges are reluctant to go where they don’t have the expertise.

**How did you start getting the *Act* changed?**

A lot of Muslim scholars helped us when we started to look into it. Also there was an international network, Women Living Under Muslim Laws, that had recently completed a ten-year research [project] on Muslim majority countries where Muslim laws were being applied.

**What did they find?**

They found that some countries' laws were better than others, but none of them had women's equality rights embedded in them—not one.

**Was there a Canadian research base?**

There was none. One or two mosques said they were using Muslim laws, but when we checked into it, we couldn't find any details about how. Now there's a professor at the University of Windsor looking into informal agreements taking place in mosques and Islamic centres, but at the time there was nothing.

**Did you see a parallel to First Nations justice?**

We didn't go there. We deliberately never compared ourselves with the aboriginal system. They have a special relationship with the federal and provincial governments, and they are not minorities, they are the First Nations.

**How did the debate broaden?**

The whole thing got terribly muddled by people saying this is multiculturalism, this is religious freedom. We kept saying we don't think it is any of those things—it is simply a fact that religious women's equality rights were being threatened.

**Were you worried about playing into intolerance?**

Yes. Reporters were always on about it being a Muslim issue. And it wasn't. It could be a Mennonite, or an Amish woman or a Hassidic woman.

**How did people react?**

There were people saying, what are you doing, washing the dirty linen of Muslims in public? Muslims felt all this argument opened up only because it was Muslims applying to use their laws, and we agreed. There was Islamophobia—people saying women's hands would be chopped off in downtown Toronto, and that wasn't true.

**But you saw it as a broad issue in Canadian law?**

We did. Why should a religious woman be treated differently from one who isn't?

**Was it difficult to be heard?**

Initially it was very bad. We were treated disrespectfully by the government and their staff, sloughing us off as a little bunch of immigrant women. We also got negative feedback from academics who said we were interfering with religious rights and women's choices.

**What was your argument on that?**

We said hang on, we don't agree. There have to be certain things that are good for everybody, and if a culture is treating a woman badly, we need to question it.

**Did you have a schism with the academic community, then?**

Not all of them. I think the academic community was torn. Some women law professors did wonderful work in support of us. And the majority of Muslim scholars were with us. But they worried about Islamophobia—everybody worried about that—and they said you have to be very careful, very delicate.



*Ms. Alia Hogben, Executive Director, Canadian Council of Muslim Women*

**What was the outcome?**

What we got was no religious law in family matters: no Jewish law, no Christian law, nothing outside the *Family Law Act*. We also got an agreement that arbitrators have to be trained. If a Muslim religious leader or a Rabbi wants to become an arbitrator, fine—but he must use Canadian law.

**Were you satisfied?**

We ended up with a huge coalition. Some feminist organizations in the coalition had for years been fighting against all private arbitration, because they felt women were in vulnerable positions and they didn't come out well from it. But they decided they weren't going to get 'no arbitration,' so they went along with us.

**So was it a victory?**

There will be legal training of arbitrators, all awards have to be registered with the Attorney General's office, the woman has to have independent legal advice, and the arbitrators have to do some kind of testing to see if there's family violence. Also there was an agreement to review the *Family Law Act* in two or three years' time. All those protections are very good. We fought for them and we got them.

**Is there a good working model for balancing gender and religious rights?**

Not that I know of. A lot of lawyers felt the *Charter* would not apply because it was set up for the individual against the state, not another individual. But with the *Charter* itself, a few law professors told us the gender equality section should override everything else.

**Accommodation of diversity has become a hot policy topic on many fronts, and now the debate in Ontario is turning to faith-based schools. What are your thoughts?**

If we're going to have a vast influx of new Canadians coming in, where will they learn about what it is to be Canadian? For me, one of the fundamental things is education. I don't want to make any assumptions about religious schools, but there is a potent argument for why all our children should be educated together.

**Then there's the debate about women voters wearing the niqab. How did this become an issue?**

From what I gather, Elections Canada, probably with the best intentions, thought this may be a problem, we'd better have some kind of ruling. But Muslim women I don't think are going to object to showing their faces. So I think it's been made into a Muslim issue, which is always our worry because immediately it gives rise to anti-Muslim hysteria. And supposedly the women in Quebec are now saying they will all put on these long black gowns and will go in and not show their faces and see how they're treated.

**Do you think Muslim women can be confident about their future in Canadian policy?**

I don't think so. While there is still stereotyping, hostility and constant jumping onto anything that smacks of Muslims and Islam, how can we be confident?

**What's next?**

We've started some research policy papers. One is on informed consent and choice, one is on cultural relativity and women, and the third one is a pilot project in the schools to address our deep concern about Muslims turning inward and self-segregating.

**So you're concentrating on building a research base.**

But it's really practical. Like with the pilot project, we are making a template that can be used in other parts of the country. So it's activism, not policy for the sake of policy.

**Have you experienced any backlash?**

No. I think it's because as an organization we keep saying we're believing women, we are proud to be Muslim, and we want to remain Muslim and find solutions within Islam. But we also feel Muslims need to be more thoughtful and self-critical. We realize it's extremely difficult, though, to be self-critical when you feel you're under siege. When you're constantly battering down the hatches, it's hard to think of anything else—but still we should try. In Canada it's possible, you see. ∞



# ACCOUNTABILITY AND EDUCATION

## Lessons from Public Administration Research

BY LARRY STEEVES, ASSISTANT PROFESSOR, FACULTY OF EDUCATION, UNIVERSITY OF REGINA

*In recent years, an increased focus on accountability, in both the United States and Canada, has dominated discussions regarding public education renewal. This article will argue that the Continuous Improvement Framework used in Saskatchewan fits the modes of accountability developed through policy research in public administration.*

The Saskatchewan Public Accounts<sup>1</sup> reveal that, in the 2006-07 fiscal year, Saskatchewan government expenditures for primary and secondary education totaled \$978 million, or 11.7 per cent of the total provincial budget. The local contribution to education, raised through property tax, provided an additional \$579 million according to Statistics Canada's Financial Management System (FMS),<sup>2</sup> for a total expenditure of \$1.559 billion. Only health related expenditures were greater. This budget prioritization reflects the importance of preschool to grade 12 (preK-12) education to the public agenda. At the national level, Statistics Canada's FMS reports that educational expenditures, including primary, secondary, and post-secondary levels, comprise 22.7 per cent of total Canadian provincial, territorial, and local government expenditures in 2007 as compared to 23.3 per cent in Saskatchewan.<sup>3</sup>

This is not a uniquely Canadian situation. Raffel, commenting from an American perspective, states,

What public function accounts for one-quarter of state and local government spending in the United States, representing one-third of total government employment in the nation, and is consistently rated by citizens as their highest priority? ...[Y]ou might have answered defense or public safety. The answer, however, is public education.<sup>4</sup>

It seems apparent that public education is an important policy and budget priority. Educational spending and its resulting outcomes are increasingly subjected to more intense public scrutiny. In recent years, an increased focus on accountability, in both the United States and Canada, has dominated discussions regarding public education renewal.

This article will argue that current accountability debates within public education are unduly narrow, often failing to take into account the complexities of public education. It

will suggest that policy research in public administration may provide the conceptual basis for a more comprehensive approach. Robert Behn, when discussing accountability, captures the essential problem. He comments that, "These accountability *holdees* have a very clear picture of what being held accountable means - to them personally...[T]wo things can happen: when they do something good, nothing happens. But when they screw up, all hell can break loose."<sup>5</sup>

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*While public education seems focused upon a relatively narrow, assessment-based approach to accountability, public administration writers present a different picture.*

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Public educators might well find themselves agreeing with Behn's statement. Levesque, in her comments regarding accountability issues within American public education, suggests that,

Accountability efforts may be no more prominent in the public discourse than in the field of education...A major initiative of the current administration in Washington has been the passage of the No Child Left Behind Act [which] requires that states test students in each of grades 3 through 8 and links improvement on these tests to continued federal funding...[T]he trend has been toward greater accountability including more severe or "high stakes" consequences for schools and students.<sup>6</sup>

While few would question the need for more explicit accountability mechanisms, the "high stakes" approach has clear disadvantages. Research by Levesque and Darling-

Hammond<sup>7</sup> focuses on accountability systems utilized by states and school districts. Both document a variety of dysfunctional outcomes resulting from the “high stakes” model encouraged by contemporary American accountability frameworks. These range from increased student dropout rates to outright cheating by school staff and system administrators desperate to ensure acceptable test results. Other issues include the disproportionate impact on racial and ethnic minorities, the removal of low achievers from the test population and, on occasion, the school itself, increased grade retention, the narrowing of curriculum, and the loss of instructional time as teachers prepare students for tests.

The Canadian context, while avoiding many of the problems characteristic of American education, also prioritizes large-scale assessment programs. Volante, in a paper reviewing the Ontario situation, suggests a heavy emphasis upon student assessment as the primary determinate of educational accountability. Volante further comments that, “The ultimate objective is to move notions of accountability from the realm of simple number crunching to a comprehensive view focused on authentic system improvement. The latter has been sorely lacking in the current mind-set that dominates accountability and assessment-led reform.”<sup>8</sup>

Public administration provides a useful perspective from which to assess accountability issues related to public education. Kearns<sup>9</sup> refers to “narrow” definitions of accountability, preferring a “broad” definition which “encourage us to consider a more diverse set of performance criteria—something beyond mere compliance and reporting. Also, these definitions help us pose additional questions to help clarify those criteria.”<sup>10</sup> Kearns provides examples, including questions such as moral obligations, level of pay to staff, consistency with the charter and mission, responsiveness to the needs of society, and to whom the organization is accountable.

Kearns<sup>11</sup> further argues that a strategic management approach incorporating a strategic plan for accountability is critical for success. He suggests that this strategic approach requires anticipation of legal trends, the ability to work successfully with stakeholders, and the sustained commitment of resources to develop accountability systems that are objective, valid, and reliable.<sup>12</sup>

Behn supports Kern’s concept of stakeholder involvement, suggesting a collaborative approach to accountability: “It could be an agreement in which *both* the managers and the overseers—indeed, *all* those in the accountability environment—have obligations...It could be an agreement that focuses less on forms, rules, and punishment and more on mutual obligations.”<sup>13</sup>

While public education seems focused upon a relatively

narrow, assessment-based approach to accountability, public administration writers present a different picture. Rather than a narrow definition, a broader, more collaborative approach that involves key stakeholders in strategic planning for accountability outcomes is proposed. This suggests an accountability perspective that is more attuned to realities facing public education—and that, potentially, is better positioned to address concerns related to American accountability initiatives.<sup>14</sup>

This broader approach has application to public education in Saskatchewan. Kern’s proposed strategic planning model reflects current provincial practice. Saskatchewan’s provincial accountability framework “guides the government’s continuing efforts to implement a managing-for-results approach within executive government, and to improve transparency and accountability.”<sup>15</sup> The Continuous Improvement Framework,<sup>16</sup> recently adopted by Saskatchewan Learning, supports the provincial accountability framework. The Guide for the Continuous Improvement Framework discusses the need for constructive dialogue, for strengthening reporting relationships between Saskatchewan Learning and school divisions, and supporting the department’s annual strategic planning and reporting process.

The foreword to the guide also states,

This guide...is designed to assist school divisions in an annual strategic planning process that identifies and aligns system priorities with appropriate strategies, operational supports and learner outcome measures. The ultimate goal...is to strengthen teaching and learning and increase opportunities for improved student learning and outcomes.<sup>17</sup>

The preK-12 restructuring process, including the reduction of the number of school divisions in Saskatchewan, also reflects a broader approach to accountability. The establishment of School Community Councils<sup>18</sup> within the



Photo credit: Audio Visual Services, University of Regina

*“The emphasis on a collaborative approach to accountability fits well within the Saskatchewan preK-12 tradition of close working relationships and ongoing consultation to address difficult issues.”*

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governance model indicates an emphasis on collaborative, community-based decision making. The requirement that School Community Councils review the school's annual learning plan illustrates a commitment to an accountability-based strategic planning process. The continuing support for the Assessment for Learning initiative<sup>19</sup> demonstrates a desire for an outcomes-based assessment model that is not “high stakes,” and that provides support to teachers and schools as they focus upon students' learning.

The emphasis on a collaborative approach to accountability fits well within the Saskatchewan preK-12 tradition of close working relationships and ongoing consultation to address difficult issues. The “partnership,” as it is referred to by system stakeholders, may sometimes seem time consuming and cumbersome, but it does provide an excellent vehicle for thrashing out difficult issues. While it can act as a brake upon system innovation, it also fosters a broader sense of cooperation that has proven invaluable.

In essence, Saskatchewan public education may have developed the conditions necessary for a broader, more collaborative approach to accountability. This has not necessarily been a deliberate plan, but an outcome of the cooperative, community-based traditions of the province. The challenge facing public education in Saskatchewan is to utilize these positive traditions to build upon innovations and address challenges, resulting from preK-12 restructuring and the provincial government's accountability framework.

These comments demonstrate the utility that concepts of accountability drawn from public administration have for public education. The narrow definitions of accountability that characterize much of the debate in North American public education have produced outcomes that are, in many ways, dysfunctional. Broader definitions of accountability, of the type suggested by Behn and Kearns, can helpfully refocus the current dialogue in public education. The fact that Saskatchewan education has *de facto* adopted a broader, more collaborative approach suggests that while frank discussion regarding the future direction of the preK-12 system is necessary, the underlying framework exists. Key stakeholders need to use this collaborative framework to address the serious accountability issues that exist in the provincial system. In a typically Saskatchewan common-sense fashion, we seem to have evolved the necessary structures for successful dialogue regarding accountability and public education. We need to use them in ways that contribute to improved practice, and the lives and learning of children. ~

#### ENDNOTES

1. Saskatchewan Finance, *Public Accounts, 2006-07*, online: Government of Saskatchewan <<http://finance.gov.sk.ca/paccts/paccts07/volume1-2006-07.pdf>>, at 14.
2. Statistics Canada, *Financial Management System*, online: <<http://www40.statcan.ca/101/cst01/govt56c.htm>> and <<http://www40.statcan.ca/101/cst01/govt51b.htm>>.
3. Ibid.
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# THE AMERICAN VIEW OF CANADIAN HEALTH CARE

## Our Neighbours, Our Selves?

BY STEVEN LEWIS, PRESIDENT, ACCESS CONSULTING LTD., SASKATOON, AND ADJUNCT PROFESSOR, UNIVERSITY OF CALGARY AND SIMON FRASER UNIVERSITY

*Health care is one of the most hotly debated issues in Canada. Based on a survey of 310 Americans living in Canada who have experienced both Canadian and American health care systems, this article compares the various merits of the two systems. This article looks at the following questions: What can we learn from the insight of non-Canadians using Canadian health care and what can we learn from health care systems in other countries?*

Medicare is like family: we bitch about it, but love it nonetheless, and most Canadians rush to its defence when the privatizers try to bully it into oblivion. It is, inevitably, imperfect, and scores of reports have produced thoughtful, comprehensive, and generally sound prescriptions for its improvement. No human system approaches the complexity of health care, and getting all of the frenetically moving parts to act in concert is no small task. Throw in a heavy dose of politics—it is doubtful that any country's health care debates are so electorally charged—and one can easily understand why change is so difficult, and why the default strategy is to throw more money in the hope of improvement.

Since we seem reluctant to follow our own counsel (the odds of implementing change seem inversely proportional to the number and quality of reports), perhaps we might take some cues from an unlikely source: the Americans. No, it's not what you think—I mean Americans who have experienced both the US and Canadian health care systems.

A team of us from the University of Calgary surveyed 310 Americans living in Canada who have experienced both systems as adults (published in *Open Medicine*, available online, free at <http://www.openmedicine.ca/issue/view/3>). This is the first head-to-head comparison of two health care systems ever done, so far as we can tell. The sample was self-selected (there is no accessible database of American émigrés to survey systematically), and the respondents were, predictably, highly educated (over half had master's degrees or higher) and prosperous (half had family incomes above \$100,000). They all had good US health insurance and no doubt experienced the best of American health care. In other words, one would expect them to have high expectations and that they would be stern critics of Canada—a stiff test indeed.

The results are in general as expected, with some surprising twists. For most categories of care they rated the American system as better (family doctor care and drugs were the exceptions). Three quarters of them rated the

overall quality of care as excellent or good in the US compared to half in Canada. They admired the shorter wait times in the US and the abundance of technology. They were irked at having to go through a family doctor to get to a specialist in Canada.

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*These highly educated and prosperous Americans have pretty much exactly the same view of Canadian health care as we do, as reported in numerous polls. We're not blind to our system's shortcomings, and they're not absurdly demanding.*

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But not even this upper-middle-class group was immune to the vagaries of US health care. A quarter said that while living in the US, they had incurred out-of-pocket health care costs that caused them significant hardship (even while fully insured), and a third reported that health insurance had been a factor in whether to accept or stay in a job. And many commented that the virtues of the American system, even for people like them, came at an unseemly cost.

Given that they rated the US system as better on most measures of access, timeliness, technology, and quality, you'd think that they would close to unanimously prefer the US system to Canada's. Not so: about equal proportions preferred the two systems. Why did so many prefer Canada's? For the same reasons we do: it is more equitable; it costs less; it is less complicated administratively; and it works pretty well, despite its warts.

And there's one other interesting feature. These highly educated, prosperous Americans have pretty much exactly the same view of Canadian health care as we do, as reported



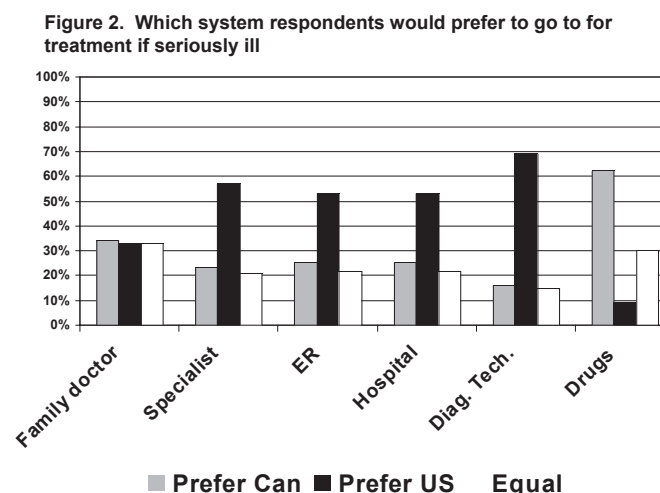
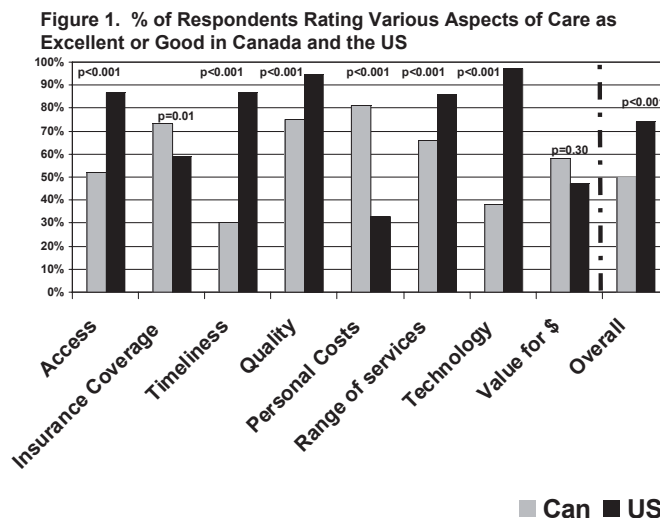
*“No human system approaches the complexity of health care, and getting all of the frenetically moving parts to act in concert is no small task.”*

in numerous polls. We’re not blind to our system’s shortcomings, and they’re not absurdly demanding. Most well-off people do not take a “serve me well, and to hell with the rest of you” attitude. The unfairness of US health care truly bothered most respondents. Even where they rated the US system as superior, there were major qualifications, as in, yes, I got great service in the US, but my neighbours didn’t, and the costs are obscene.

So what should Canada take from this? First, that it’s okay to expect more from the system, and there’s nothing unique or ungrateful about our critiques of what ails it. After all, we’re spending \$150 billion a year on health care, which should surely be enough to deliver timely, high quality service. Second, access issues tend to govern our overall perception of the system. It doesn’t matter if the service is good if it’s not timely. We’re right to demand shorter wait times, and other heavily public systems have achieved them. In England, if you call for a doctor’s appointment on a Monday, 99 per cent of the time you’ll be offered one by Wednesday. The formerly horrendously long wait times for surgery are a relic of the past; the National Health Service predicts that within two years, no one will wait more than four months from the time she walks into the GP’s office to the time she receives whatever procedure is needed. Third, don’t sacrifice equity and efficiency when reforming the system. There is, after all, remarkable solidarity among classes. Well-off people from a highly individualistic society care about fairness too.

The Americans had little good to say about employer-based insurance, and the costs of care south of the border. They have seen the profit motive at work and even many of those whom it appears to serve well are fully aware of and cynical about its handiwork. The lesson we should take from this is that we need to make Canadian Medicare better, and we should rebuild it on the principles that led to its creation. Our biggest challenge is to implement the policies that will both preserve the principles while removing the perverse incentives that impede improvement. We have too much fragmentation, and too much autonomy without accountability. We trail our peers in adoption of health information technology. These flaws are unacceptable, and the public should say so.

Finally, while rightly demanding real and comprehensive change, we need to reserve some of our civic energies for other causes. Health care is not a goal in itself; it is instrumental to the pursuit of a healthier society. Beyond about \$1,000 a year per person, there is no relation



between health care spending and population health status. We’re at about \$4,600 and counting. The US spends over half as much again, yet has the worst health status of any of the world’s 20 or so richest countries. Health care should be effective, efficient, and timely. But it should not be the sole or even the main expression of our solidarity with and concern for each other. The route to reducing health disparities—the number one cause of preventable health problems is inequality—lies in education, stable and rewarding employment, high quality early childhood development, and breaking intergenerational patterns of disadvantage. Several nations do better than we do, and let’s learn from them too. ∞



# THE CLASH OVER THE NATURE OF ENVIRONMENTAL LIMITS

## Climate Change and Global Greenhouse Gas Reduction

BY BRUCE PARDY, ASSOCIATE PROFESSOR, FACULTY OF LAW, QUEEN'S UNIVERSITY

*Real progress on climate change has proven difficult to achieve. One of the obstacles is lack of agreement on a common basis for calculating national emission limits. This article considers the acute conflict between two propositions with vastly different implications for domestic and international climate change policy.*

Your neighbours have ten children. Their house and yard is smaller than yours, and you live alone. You like them, and wish them the best, but some problems have arisen. The children play on your lawn. Their mother has planted vegetables in your garden. The father parks his car in your driveway because theirs is full. Their garbage regularly ends up on your property because they have more than permitted at the curb for pickup. They have started to build an addition onto their house over the lot line. Before you call your lawyer or the police, you ask the parents to restrict themselves to their own property. They seem shocked. They say "But we have a dozen people here, and you only have one. Surely you will share your space with us. You're not planting vegetables in your garden, why shouldn't it be used to grow food? You put out one bag of garbage every week. That's twice as much as we do—we only have six bags a week for 12 people."

Within the domestic law of property, your neighbours' attitude is untenable. But in the realm of international climate change policy, their proposition has traction. In the international sphere, Canada's neighbours include China, India, and other developing countries that have populations far in excess of our own. When it comes to global environmental degradation and climate change in particular, they say our per capita contribution is much higher, and that therefore theirs can go up and ours should go down.

Per capita ecological footprints are indeed higher in the developed world. In its *Living Planet Report 2006*, the World Wildlife Fund (WWF) lists countries in order of size of their per capita ecological footprints (of which a significant portion consists of greenhouse gas (GHG) emissions). Seven of the top ten are Western nations: the United States, Finland, Canada, Australia, Sweden, New Zealand, and Norway (the others are the United Arab Emirates, Kuwait, and Estonia).

In the same document, the WWF also reports that six of the seven Western nations in the list above, including

Canada, live within their biological capacities (the US is the exception). Even given the amount of environmental resources consumed by each of their citizens, including high per capita carbon emissions, the total ecological load in these countries is smaller than their ecosystems and natural resources are able to provide. These nations do not impose massive environmental externalities on the rest of the world. In contrast, the United States is in ecological deficit, as are China, India, and oil-producing countries of the Middle East.

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*Should nations have an obligation to avoid imposing environmental burdens upon other countries or the world as a whole? Or should every person on Earth be entitled to an equal or comparable amount of environmental resources, regardless of where they live?*

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Herein lies an acute conflict between two propositions with wildly divergent implications for climate change policy. Should nations have an obligation to avoid imposing environmental burdens upon other countries or the world as a whole? Or should every person on Earth be entitled to an equal or comparable amount of environmental resources, regardless of where they live?

These two ideas are incompatible and mutually exclusive. Imagine a binding global treaty for GHG reduction that reflected the first principle. Under such a treaty, the cap for GHG emissions from Canada and China should be about the same amount, since Canada and China are approximately the same size and could be expected to have comparable biocapacities. Since Canada presently contributes around 2 per cent of annual global carbon emissions, and China contributes close to 18 per cent, China

*“If the per capita amounts were equalized by bringing Canadian emissions down, Canada’s economy and living standards would have to be reduced to that of a relatively poor third world country.”*

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would have a far more onerous responsibility to reduce its emissions than Canada.

Compare that conclusion with a hypothetical GHG treaty with limits based on comparable per capita emissions. Since China has a population around 40 times the size of Canada’s, its total cap should be about 40 times as high. If the per capita amounts were equalized by bringing Canadian emissions down, Canada’s economy and living standards would have to be reduced to that of a relatively poor third world country. If China’s per capita emissions were raised to Canada’s present levels, a significant increase in global GHG concentrations would occur.

Neither of the two competing propositions is established in international law, although support can be found for each. The Stockholm (1972) and Rio (1992) Declarations state, “States have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or beyond the limits of national jurisdiction.” The 1941 *Trail Smelter* decision, in which liability was imposed on Canada for environmental damage suffered in the United States, required that the polluting act cause serious injury established by clear and convincing evidence. Merely contributing to the accumulation of GHGs in the atmosphere would fall short of this standard.

The principle of equitable utilization of resources, referred to in such documents as the 1997 International Watercourses Convention, can apply in situations where nations share a resource such as a watercourse or coastal area, subject to the extent to which the resource is situated within a country’s territory. The principle of “common but differentiated responsibilities” articulated in the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Rio Declaration reflects the idea that environmental burdens may not be equally shared among states. But these principles fall well short of the notion that environmental resources must be shared in proportion to population.

Neither per capita allocations nor national biocapacity is tenable as a basis for GHG limits in climate change negotiations. Per capita measurements would require developed nations with low populations to shoulder burdens disproportionate to the contributions that they make to annual GHG accumulation. They would be required to commit economic suicide to meet the emission reductions necessary to reduce their per capita emissions to a level



*Photo credit: Audio Visual Services, University of Regina*

comparable to the developing world. On the other hand, the population in a few developing countries is so high that there is no realistic prospect that their overall environmental burden or level of carbon emissions could be limited to their national ecological capacity if they continue to grow industrial-style economies.

An alternative to using either of these measures is to calculate each country’s limit as a proportion of its present level. Kyoto took this approach, but that was one of its flaws, and was only possible from a political perspective because developing countries were exempt from targets. Developing nations would be unlikely to agree to join such a scheme because it would preserve the established order and therefore favour developed economies. Conversely, developed countries would not contemplate the reverse—lowest caps for highest historical emissions—since the richest, most developed countries would experience the most destructive economic effects.

Principles that govern environmental behaviour around the globe are not as well established as those that apply down the street. How should environmental limits be calculated? Achieving an effective global treaty on GHG emissions will require resolution of this question. ♪

# THE IMPAIRED CORPORATION: CHARGES PENDING?

## Curbing Impaired Driving and Workplace Injuries

BY ALLAN WALKER, GOVERNMENT OF SASKATCHEWAN SENIOR POLICY FELLOW, 2007-08

*This article contrasts public attitudes and legal sanctions regarding impaired driving and unsafe work conditions. Both situations put people at unnecessary risk. Both claim a thousand Canadian lives a year. Both are subject to charges under the Criminal Code. However, Canada still seems more tolerant of workplace injuries than of impaired driving.*

How do we hold people accountable who put others at unnecessary risk; whose behaviour can cause others serious injury or even death? Approaches to impaired driving and workplace safety offer a comparison in public attitudes and policies. These issues should be of particular concern to Saskatchewan people as the province has some of the highest incidences of both impaired driving<sup>1</sup> and workplace injuries<sup>2</sup> in Canada.

Over the last 30 years, the public and the justice system have taken an increasingly strong stand against drinking and driving. The Canadian Centre for Justice Statistics found that by 2002 the rate of police-reported impaired driving incidents had declined 65 per cent after peaking in 1981.<sup>3</sup> The report cites a number of inter-related factors likely contributing to this improvement, including an aging population, advocacy groups such as Mothers Against Drunk Drivers (MADD), less public tolerance for impaired driving, and more rigorous enforcement.

The hybrid offence of driving while impaired has been a Criminal Code offence since 1951. The introduction of compulsory breath testing and the “.08” standard in 1969 enabled the criminalization process. A review of 2001-02 court cases revealed a 73 per cent conviction rate for the 67,000 persons charged with impaired driving charges; significantly higher than for other Criminal Code offences. Though impaired driving remains a serious problem, killing over 1,000 Canadians in 2004, there has been a significant reduction in the number of deaths and injuries.<sup>4</sup>

Another predictable and preventable cause of death and injury are workplace injuries. Worker compensation boards reported 1,097 workplace fatalities in Canada in 2005, up 45 per cent from the 758 reported in 1993.<sup>5</sup> Factoring in workforce changes, the national fatality rate increased from 5.9 per 100,000 workers in 1993 to 6.8 in 2005. The lion's share of the increased fatality rate is attributable to increased

incidence in deaths from occupational diseases, in particular from asbestos exposure. Although numbers are declining, there were still 338,000 time-loss injuries in 2005.<sup>6</sup> Valid trend measures are compounded by the ever changing nature of work and our understanding of injuries and illnesses.<sup>7</sup>

In Canada, standards for workplace health and safety come under provincial legislation, except in the case of federally regulated workplaces. The penalties for non-compliance vary according to province and type of infraction. In Saskatchewan, for instance, a person convicted of causing the death or serious injury of a worker can be fined up to \$300,000 and sentenced up to two years in jail.<sup>8</sup>

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*We don't blame victims of drunk driving for being in the way, but Canadians are prepared to blame injured workers for causing their own misfortune.*

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These sanctions are used sparingly in most provinces. Saskatchewan Labour reported 30 prosecution cases under provincial legislation in 2006-07 as part of a government action plan to reduce injuries through education and enforcement.<sup>9</sup> Although relatively few, this is four times the number of annual prosecution cases from a few years ago. The number of prosecution cases represents a very small percentage of workplace safety violations and injuries. The Saskatchewan Workers Compensation Board reported 22 fatalities and nearly 14,000 time-loss injuries in 2006.<sup>10</sup> The provincial labour department conducted 4,500 inspections and issued over 4,400 safety contraventions in 2006-07.<sup>11</sup>

Workplace injuries, even fatalities, tend to draw little

*“How do we hold people accountable who put others at unnecessary risk; whose behaviour can cause others serious injury or even death?”*

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public attention unless they are dramatic. A Nova Scotia mining disaster in 1992 generated a public and political push for stronger safety enforcement and stronger penalties for non-compliance. An explosion killed 26 underground coal miners in Plymouth County.<sup>12</sup> The Westray public inquiry commissioned by the Nova Scotia government found the company's negligence of safety standards so egregious it recommended that the Government of Canada amend federal legislation to hold corporate officials properly accountable for workplace safety.<sup>13</sup>

In March 2004, largely in response to the review of the Westray tragedy, Bill C45 amendments to the Criminal Code came into effect. Sections were intended to modernize criminal liability to better reflect the complexity of corporate structures. These changes included defining who can be held responsible (*e.g.*, representatives, senior officers) and adding provisions such as being party to an offence, as well as committing an offence. To be convicted of a crime of negligence, the Crown must still prove that the corporate officer(s) or representative(s) responsible departed markedly from the standard of care that could be expected.<sup>14</sup>

Has Bill C-45 increased corporate commitment to providing safer work environments? In checking with ministries of labour, it appears there has not yet been one conviction under the new law. It could be that many jurisdictions, like Saskatchewan, have decided to make more rigorous use of penalties under provincial legislation for neglecting safety standards rather than try for a criminal conviction where the burden of proof is more onerous, despite Bill C-45 amendments.

It could also be that the Canadian public and their regulatory agencies are not prepared to treat corporate neglect as criminal behaviour, even if it is wilful and contributes to workplace injury and death. It hasn't been that long since impaired driving has not only been treated as criminal, but measures have also been developed to facilitate charges and convictions. Is it fair to compare impaired driving with violations of safety regulations?

We don't blame victims of drunk driving for being in the way, but Canadians are prepared to blame injured workers for causing their own misfortune. In a 2005 Ipsos-Reid public opinion poll conducted for the worker compensation boards, only 36 per cent of those polled agreed with the statement that accidents and injuries caused by drinking and driving are an inevitable part of life.<sup>15</sup> In contrast, 61 per cent agreed with the statement that workplace accidents and

injuries are an inevitable part of life.

In short, twice as many believe that drunk driving can be prevented compared to those who believe workplace injuries can be prevented. Further, 76 per cent agreed with the statement that most accidents and injuries in our workplace are the result of employee carelessness or lack of attention. The polling reflects a continuation of the “worker's fault” myth that is not supported by accident investigation research, which shows most worker injuries are the tip-of-the iceberg of systemic breakdowns in safe work processes.<sup>16</sup>

The lack of criminal convictions would not surprise those critical of Bill C-45. Bittle and Snider contend that conservative conceptualizations respecting corporate liability limited the reform options considered by the Parliamentary Committee that held hearings into the Westray disaster.<sup>17</sup> They anticipate that the resulting legislation will do little to challenge the structural conditions that underlie culpable workplace injury and death.

It is questionable if the Bill C-45 amendments will have much effect if convictions are rare to non-existent. Especially if most Canadians continue to believe workplace injuries are not only inevitable, but usually the worker's fault.

To their credit, labour, business, and government have increasingly worked together to make work safer. Jurisdictions employ multimodal prevention strategies including worker/employer workplace committees, safety management systems, public education, and regulation. No single intervention, whether it is an incentive or deterrent, can be expected to be the silver bullet of change. However, it does not appear likely that the current mix of education and enforcement initiatives will include a vigorous application of criminal law.

So far, it appears Canadians are far more likely to use the criminal courts to make their roads safer than to make their workplaces safer. ♪

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# “CLEANING HOUSE”

## Or *Stare Decisis* in the Supreme Court of Canada

BY GRAEME G. MITCHELL, DIRECTOR, CONSTITUTIONAL LAW BRANCH, SASKATCHEWAN JUSTICE\*

*In June 2007, the Supreme Court of Canada cleaned house! The Court overruled four important rulings under the Canadian Charter of Rights and Freedoms, effectively disavowed a fifth, and rejected the continued operation of the federalism doctrine of inter-jurisdictional immunity. This article reflects on what these important judgments teach us about how stare decisis applies to the Supreme Court's constitutional jurisprudence.*

*Stare decisis* or fidelity to precedent is a foundational precept of a common law system fostering consistency, continuity and predictability in the law. Yet, for the Supreme Court of Canada, our nation's highest court and tribunal of last resort, this doctrine should operate more flexibly in constitutional matters. In *Hunter v. Southam*,<sup>1</sup> an early influential ruling under the *Canadian Charter of Rights and Freedoms*, Chief Justice Dickson encouraged judges to adopt a purposive approach to *Charter* interpretation so it is not read “like a last will and testament lest it become one.”<sup>2</sup> As a constitutional document it must be “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”<sup>3</sup>

This purposive interpretive approach eschews originalism and invites a relaxed application of *stare decisis* in the Supreme Court's jurisprudence. Constitutional adjudication should not be a static enterprise. This does not mean that *stare decisis* is disowned entirely. The wholesale repudiation of a prior constitutional judgment, particularly one of long-standing, is significant, and disrupts the stability and predictability of the law. Some critics even claim an over-ruling is tantamount to a constitutional amendment absent the transparency and accountability which attend the formal procedures located within Part V of the *Constitution Act, 1982*. While such a suggestion is an exaggeration, it underscores the seismic effect the rejection of an earlier line of precedent could potentially have upon our law and body politic.

Although the Supreme Court may be less constrained by the rigors of *stare decisis*, it is extremely rare for it to overturn a prior ruling, particularly one of recent vintage.<sup>4</sup> It was astonishing then that in the final weeks of its 2006-2007 term, the Court expressly over-ruled four important *Charter* decisions, effectively disavowed a fifth, and rejected the continued viability of the doctrine of inter-jurisdictional

immunity, a principle of federalism for more than 100 years. In June 2007, the Supreme Court cleaned house!

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*To ensure that the Constitution of Canada matures and does not petrify into this nation's last will and testament, the operation of stare decisis in constitutional matters must be relaxed in the Supreme Court of Canada.*

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When the justices feel compelled to reject an earlier precedent, it is critical that a principled jurisprudential rationale be advanced to support it. The fact the Court's membership changes or voting patterns evolve are hardly convincing reasons for upsetting a well-established ruling or line of cases. In *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*,<sup>5</sup> the Court repudiated certain aspects of four foundational cases under freedom of association, to the effect that the right to bargain collectively is not guaranteed by section 2(d) of the *Charter*. Chief Justice McLachlin and Justice LeBel determined that the Court erred in those earlier decisions. They invoked the difficult history of labour relations in Canada, as well as international documents to which Canada is a signatory to support their conclusion that the *Charter* should now guarantee constitutional protection for a collective bargaining process. Yet all these factors existed at the time the earlier cases were decided. The judges failed to identify any fundamental change that has intervened since those earlier judgments which foreshadowed such a remarkable over-ruling.

In *R. v. Hape*,<sup>6</sup> the Court (5:4) narrowly disapproved of



*“The wholesale repudiation of a prior constitutional judgment, particularly one of long-standing, is significant, and disrupts the stability and predictability of the law.”*

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*R. v. Cook*, a judgment rendered less than a decade ago, which accepted very limited extraterritorial application of the *Charter*. Justice LeBel for the majority concluded the earlier case was erroneous as it failed to conform to international legal principles. Although the dissenting justices urged that the “practical and theoretical difficulties” arising from the application of *Cook* be resolved in subsequent cases, they did not prevail.

In *Canadian Western Bank v. Alberta*,<sup>7</sup> the Court severely constrained the operation of the doctrine of inter-jurisdictional immunity, a federalism principle which immunizes typically core federal legislative jurisdictions against interference from provincial laws of general application. Justices Binnie and LeBel speaking for the Court save Justice Bastarache determined that in the modern Canadian federation this doctrine is anachronistic. The interpretation of the division of federal and provincial legislative powers evolves and “must be tailored to the changing political and cultural realities of Canadian society.”<sup>8</sup> This did not include insulating the federal government from compliance with valid provincial laws, except in cases of operational conflict.

What is significant about these cases is not that the Supreme Court rejected prior case law or determined that a constitutional principle no longer is viable—it is not hidebound by precedent—but rather the basis upon which it decided to do so. In both *Health Services* and *Hape*, the Court effectively changed its mind, essentially because the justices concluded the rationales underlying the earlier cases could not withstand critical scrutiny. In *Health Services*, the Court preferred the dissenting opinion of Chief Justice Dickson in the *Alberta Reference* and believed the time had come to embrace the reasoning and result espoused by the late Chief Justice and the late Justice Wilson in that case. In *Hape*, the majority concluded that the *Cook* Court had not been sufficiently attentive to principles of customary international law and, as a consequence, the legal rules established in that case were beyond redemption.

Contrastingly, in *Canadian Western Bank* the motivation for the Court to turn its back on a long line of case law and reject the continued operation of the doctrine of inter-jurisdictional immunity was more profound. Politically and philosophically, there is little room in a mature 21<sup>st</sup> Century federal system for a constitutional principle that wholly exempts the federal level of government from complying with valid provincial laws. The Court rightly determined that

only in situations of express contradiction is declaring the local law inoperative warranted. *Canadian Western Bank* is a satisfying example of our high court rethinking its previous decisions for reasons of political and historical evolution.

To ensure that the Constitution of Canada matures and does not petrify into this nation’s last will and testament, the operation of *stare decisis* in constitutional matters must be relaxed in the Supreme Court of Canada. The Court should enjoy latitude to revisit, rethink, and in appropriate circumstances, revise or reject earlier cases or principles. At the same time, the decision to take such an extraordinary step must be achieved with considerable intellectual rigour. Indeed, it may require even greater care and critical analysis to overturn a line of precedent than it did to create it. When cleaning house this past June, the Supreme Court’s performance of this monumental task proved uneven.

\*Q.C., Director, Constitutional Law Branch, Saskatchewan Justice, and Vice-Chair, National Constitutional and Human Rights Law Section, Canadian Bar Association. The views expressed do not represent the opinion of the Attorney General for Saskatchewan or his department. ✎

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3. *Id.*
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6. 2007 SCC 26, overruling *R. v. Cook*, [1998] 2 S.C.R. 597.
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# PUNISHMENT IN THE CRIMINAL JUSTICE SYSTEM

## How Effective is the Rationalist Assumption?

BY OTTO DRIEDGER, PROFESSOR EMERITUS, UNIVERSITY OF REGINA

*Using the Criminal Justice System in Canada as the example, this article examines the benefits and drawbacks of using a rationalist approach to punish criminal offenders. The assumption is that the “rational person” will refrain from further criminal activity if the punishment fits the crime. However, the author argues that punishment further alienates offenders and confirms their view that laws and regulations are not for their benefit.*

The “Age of Reason and Enlightenment” brought with it many profound and effective ways of dealing with our physical and human environments. Much has been accomplished as a result of the application of the scientific method that has been of benefit to humanity. Technological and mechanical development have enhanced the standard of living and comfort level for people.

Application of the principles of rationalism in societal and interpersonal affairs have enhanced, if not formed, the basis of the rule of law, making judgements on the basis of evidence, promoting analysis of human relationships, and developing responses that enhance human well-being.

On the other hand, we are also discovering the other side of the coin. The impact on the environment of massive “development” is one such example. Another is the capability of mass destruction of people and property through weapons technology. The impact of an analytical examination of the management of people and societies has made it possible, if

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*This double dynamic of the rationalist view of punishment as deterrent and as a convenient cover for vengeance means that there is powerful and persistent support for punishment as the basis for response to criminal activity.*

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used for self-interest or domination, to implement Machiavelli’s principles effectively. John Ralston Saul in his book *Voltaire’s Bastards* provides an excellent discussion of this side of the coin. He points out that if values are removed from the equation, the advances due to the Enlightenment can be used for destructive purposes. In addition, a single-minded focus on rationalism can lead to inappropriate judgements in dealing with human problems.<sup>1</sup>

Criminal justice systems in the West are based on rationalism. There have been many benefits in this approach. It has led to the rule of law, judgements of guilt or innocence based on evidence, and sentences based on “the punishment fits the crime” rather than on emotion or vengeance.

There are also negatives to the rationalist approach; examples of these negatives can be found in the Criminal Justice System in Canada. The Criminal Code of Canada is based on rationalism. The assumption is that the “reasonable person” will refrain from further criminal activity if “the punishment fits the crime.” Persons will not want to experience incarceration, and if they do, the experience of restriction of liberty will mean that they will not repeat the crime in order to avoid the punishment. If the person continues to offend, the assumption is that the punishment was not severe enough, and that a heavier penalty will deter further offending. This rationale is applied repeatedly even when the evidence is clear that in a very large percentage of situations this approach does not work.



Photo credit: Fred Burch

*“Persons will not want to experience incarceration, and if they do, the experience of restriction of liberty will mean that they will not repeat the crime in order to avoid the punishment.”*

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In addition to the above rationalist assumptions of punishment, is the fact that in the minds of many citizens and some professionals in criminal justice there is the element of vengeance. Many do not want to admit to vengeance, but punishment is a convenient camouflage for it.

This double dynamic of the rationalist view of punishment as deterrent and as a convenient cover for vengeance means that there is powerful and persistent support for punishment as the basis for response to criminal activity.

Let us examine the flaws in rationalism as the primary or only basis for responding to criminal offending.

Almost everyone grows up in a family. Families are generally seen to be a place of nurture, love, and concern for the well-being of children. The responsibility of parents is to nurture, love, and direct children into becoming well-adjusted adult citizens. In the context of a family where love, trust, and nurture are basic, a child will respond positively to discipline. When such a child grows up to be an adult, he or she will generally respond positively in society and conform to the rules and regulations, as well as to the consequences (punishments) of infractions. The preventive effectiveness of speeding and parking tickets are an example. For the average citizen, society's laws and regulations are seen as being of benefit to everyone and conformity is accepted.

There are several reasons why the logic of the above does not transfer to adult offenders. For adults, society is not seen as a parent. The relationship is not one of trust, love, and commitment to the well-being of members of society as there is in the family. The majority of offenders are alienated from society. Punishment further alienates them, and confirms their view that the laws and regulations are not for their benefit.

In addition, adults do not take kindly to being treated as children. Children will often conform to punishment in schools or children's institutions because they recognize their role as children, although one finds that children will often run away from such facilities if they become too alienated. Adults will generally reject

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*For adults, society is not seen as a parent. The relationship is not one of trust, love, and commitment to the well-being of members of society as there is in the family.*

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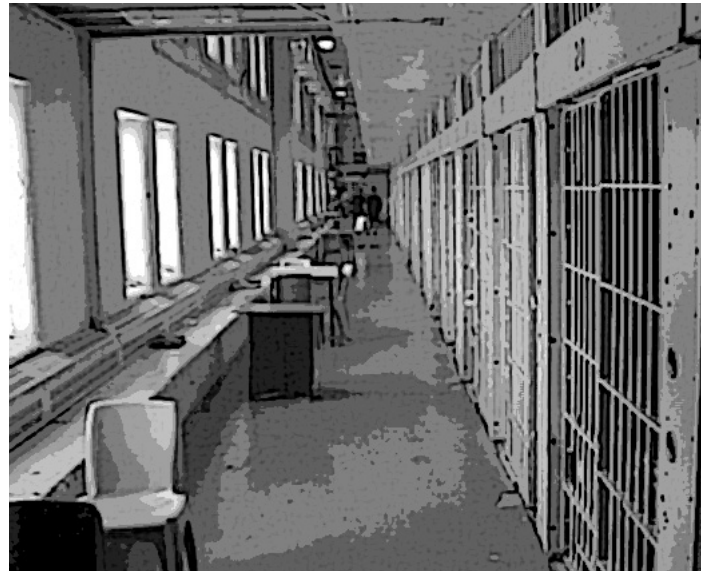


Photo credit: Fred Burch

such requirements and respond with hostility and further alienation.

These two factors put a heavy caveat on the logic of the effectiveness of punishment being corrective.

I should add a note about children. Children who grow up in homes where there is abuse—whether physical, emotional, or psychological and/or neglect—grow up being alienated from their family and society. Discipline in such a home further alienates the child rather than correcting the child.

Recognition of the inadequacy of punishment as the default position in dealing with crime has led to experimentation with a range of options that have led to the conceptualization of restorative justice. As indicated in my earlier article “Restorative Justice, a movement gaining momentum,” there are a range of initiatives since the late 1940s that have and are exploring alternatives to the punishment model.

I am not suggesting elimination of the present criminal justice model, but that there be alternative restorative justice approaches and models available on the same level of prominence and funding when such approaches are appropriate. ♪

#### ENDNOTES

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# CONVENTION TO STRENGTHEN DIVERSITY

## Protecting and Promoting the Diversity of Cultural Expressions

BY GEORGE RIGBY, THE CANADIAN CULTURAL OBSERVATORY

*This article examines Canada's role in creating an international legal instrument—the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions—and the effect of this instrument on ensuring a plurality of cultural expression in countries throughout the world.*

Canada has consistently played a leading role in promoting the development and adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The federal government has been supported by a consensus built with other countries, as well as with its provincial and territorial partners—particularly Quebec—and civil society.

An international legal instrument, the Convention reaffirms the right of countries to implement cultural policies to support the diversity of cultural expressions and to recognize the twofold benefit, economic and social, of cultural goods and services.

The Convention will benefit governments, by recognizing their legitimate role in supporting creativity through cultural policy and by providing them with a point of reference for international agreements that include a cultural dimension. It reiterates the right of states to establish funding programs, content rules, tax measures, measures to protect intellectual property, and publicly funded cultural institutions that support national artists and cultural industries.

The Convention will provide cultural industries with an international environment conducive to a dynamic exchange of their products, by encouraging signatory states to facilitate dialogue on cultural policy; to strengthen partnerships with civil society, non-governmental organizations, and the private sector; and to promote the use of new technologies. It also encourages countries to develop partnerships to improve information sharing and cultural understanding, in particular by signing joint production and joint distribution agreements. In addition, it advocates the establishing of an International Fund for Cultural Diversity.

Citizens will benefit as a result of the Convention because it will help ensure them access to a diversity of cultural products of their own and other countries.


On October 20, 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and, on November 25,

2005, Canada became the first country to officially ratify it. The Convention came into force on March 18, 2007 and by July 2007 had been ratified by 40 states.

Article 20 of the Convention places it on equal footing with other international treaties. It also states that other treaty rights and obligations are not modified by the Convention. However, the Parties to the Convention must take this document into account in interpreting and applying the other international treaties they subscribe to.

Canada firmly believes that it is essential for Canadians to have the means to express themselves through books, magazines, music, television, film, new media, and world culture. It sees cultural diversity as a source of creativity, innovation, social cohesion, and economic development.

Our artists and creators have made Canada a dynamic, forward-looking, and diversified country. The Canadian government has played an active part in this success. Various measures—in particular publicly funded cultural institutions, funding programs, content and foreign investment rules, taxation, and intellectual property measures—have enabled Canada to promote its cultural diversity.

The UNESCO Convention is in keeping with Canada's desire to support our artists and creators. It is an expression of our collective desire to live in openness with the world and its richness. 

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\* The Canadian Cultural Observatory <[www.culturescope.ca](http://www.culturescope.ca)> is a national information service that supports cultural development in Canada by informing the cultural policy and research community, encouraging evidence-based policy and planning, and stimulating community debate.



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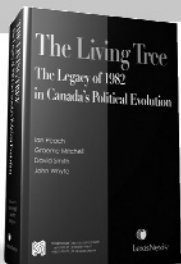
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# JACK BOAN AT 90

The Saskatchewan Institute of Public Policy salutes Jack Boan, Professor Emeritus of Economics at the University of Regina, on his turning 90 this coming December.

Jack is one of those committed souls who, present at the University of Regina in its infancy, helped to build a solid scholarly community that was committed to the idea that scholarship should relate to real social conditions. The founding members aspired to build a university at which students would be invited to engage with the challenge of defining and implementing social justice. In the course of his 45 years at the University, Jack has played a major role in developing both sound public policies and in practicing serious policy scholarship. He has been an influential member of a university community that in addressing pressing economic and social policy issues formed the strong base on which the Saskatchewan Institute of Public Policy and the Johnson-Shoyama Graduate School of Public Policy now stand.

Jack's doctorate from The Ohio State University was in agricultural economics and this interest has never left him. But, it was the opportunity fairly early in his professional life as a federal public servant to join the five member research staff of the Royal Commission on Health Services, known popularly as the Hall Commission, that shaped his abiding policy pre-occupation—the structuring of health care service delivery that would fully meet the health and social needs of all people. This, for Jack, became both a discipline and a passion. Through his lectures and writing in the area at the University of Regina, he has become a recognized leading Canadian voice in health care issues.

Since coming to the Regina campus in 1962, Jack's dedication, his energy, his commitment to justice, and his scholarship have never flagged. His efforts created prestige for university based policy analysis that lends credibility to SIPP's mission to this day. ∞

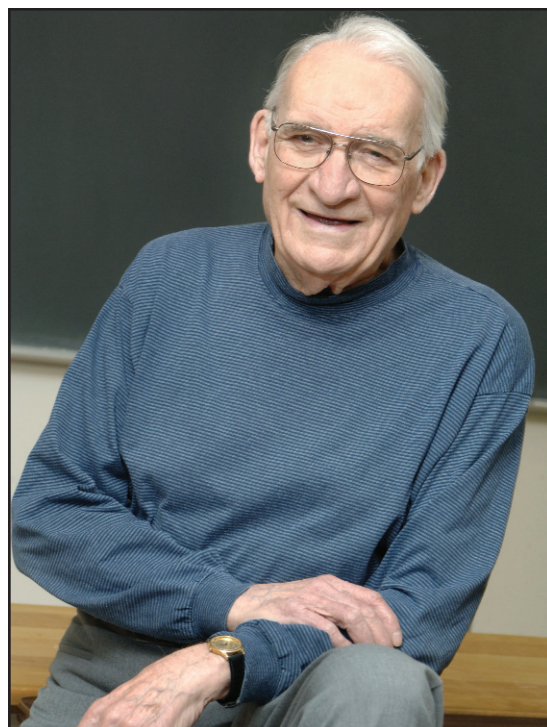


Photo credit: Audio Visual Services, University of Regina

## SIPP Event Calendar, Fall 2007

### October 2007

- ~ Special presentation: *Can Divisions in the Biotechnology Policy Community be Overcome?* with Dr. Éric Montpetit, Université de Montréal

### November 2007

- ~ Registration opens for the 2008 President's Leadership Program
- ~ November Armchair: *What 15 Years of Longitudinal Research Tells us about Access and Equity Issues in Canada* with Dr. Lesley Andres, Department of Educational Studies, UBC
- ~ SIPP Members' Night
- ~ Special presentation: *Saskatchewan Check Up, 2007: Saskatchewan as a Place to Live, Work and Invest* with Nola D. Joorisity, Institute of Chartered Accountants of Saskatchewan
- ~ Scholar Series Presentation: *The Impact of the Spanish Influenza on the Criminal Justice System* with Frederick Burch, 2006-07 Government of Saskatchewan Senior Fellow
- ~ Special presentation: *Aging and Social Justice* with Dr. PG Forest, President of the Trudeau Foundation

### December 2007

- ~ SIPP Christmas Reception