

# **Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence**

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## I. INTRODUCTION

The debate concerning the legitimacy of judicial review will never end, we may as well face it.

Much discussion has been devoted to determining whether judicial activism or judicial restraint plays a more prominent role in constitutional litigation. The debate usually focuses on the conclusion reached by a judge, activism being associated with the striking down of legislation and restraint with its validation. To a certain extent, the debate so understood could be reduced to numbers, proportions, and statistics concerned exclusively with outcomes in constitutional litigation.

Yet one cannot escape the impression that the debate about judicial activism is actually concerned with social values rather than with mere statistics, and it is tempting, yet perhaps hazardous, to associate activism with progressiveness, and restraint with conservatism.

Furthermore, these notions of progressiveness and conservatism can be understood as referring to institutional boundaries between state actors, or alternatively, to the political character of the decision reached.

With regard to institutional boundaries, a conservative conception insists on the democratic legitimacy of parliaments regarding social

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policies, and requires a general approach of judicial non-interference, save in clear cases of constitutional invalidity.

But in reality, it is the very nature of the legislation itself, its social, progressive, or conservative quality, that dictates the labelling of the outcome following its constitutional challenge. A judicial declaration of constitutional validity can be progressive, while the striking down of legislation can be conservative. It will depend on the object of the constitutional litigation, that is, the social value of the impugned legislative choice. It is therefore misleading to blindly associate judicial activism with progressiveness and judicial restraint with conservatism. It depends on the historical, social, and political context.

Ultimately, it comes down to the political preferences of the observer. The qualification of a political choice as conservative or progressive is highly and inherently subjective.

However, a consideration of how judges proceed, of judicial methodology rather than conclusions, can shed a different light on the discussion of judicial activism and restraint in constitutional litigation.

Judicial restraint, as understood in its methodological aspect, can involve an exclusive focus on the text of the impugned statute, as opposed to a consideration of empirical realities; or again passive observation of the litigation and mere acknowledgement of the evidence adduced by the parties, leading to an objective discovery of whether or not the burden of proof has been discharged. The judge takes note of this fact but makes no judgment, and has no involvement in the matter. The legislator's unverified factual hypotheses are taken for granted. Understood in procedural terms, the judge acting with restraint has no impact on the result. She observes, discovers, but does not act. According to this logic, for example, it is section 52(1) of the *Constitution Act, 1982*<sup>1</sup> that renders laws unconstitutional, and not the ruling of the judges.<sup>2</sup>

The activist judge, at this methodological level, fully participates in the debate. She goes beyond the study of the legislative provisions,

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<sup>1</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>2</sup> "The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1)": *Nova Scotia (Workers' Compensation Board) v. Martin (sub nom. Nova Scotia (Workers' Compensation Board) v. Laseur)*, [2003] 2 S.C.R. 504, at para. 28, [2003] S.C.J. No. 54 [hereinafter "*Martin*"].

ventures into the empirical world. She needs to understand the way the world works in order to be able to correctly rule on the constitutional validity of a statute. She does not feel constrained by the factual conclusions underlying legislative action. She makes her own exploration of factual issues and uses a very wide notion of judicial notice.

However, the strongest case of judicial activism with respect to methodology, it seems to me, flows from unpredictability of approach. It is a powerful form of activism, the last word for the judges. It is the power to decide and modify methodological requirements as cases arise and unfold. It is the power to pave the way to the desired result, to the chosen destination. It is powerful, maybe to some extent unavoidable, and it is dangerous. I readily acknowledge that one should not make too much of “conceptual elegance.”<sup>3</sup> But, as has been written, “[w]hile imprecision in the substantive law may potentially affect a certain segment of our society, vagueness in legal methodology has effects that pervade the entire judicial system in its broadest sense and are accordingly felt by society as a whole.”<sup>4</sup> One should not forget “the social cost of continued uncertainty in the law.”<sup>5</sup>

This article will discuss some of the more problematic aspects of legal methodology. It will address an ambivalent judicial attitude with regard to the factual component of constitutional adjudication in Part II, some uncertainty as to the object of judicial review (whether it is the rule or the statutory provision expressing it) in Part III, and finally, some confusion between two stages of judicial review that should be kept conceptually distinct (the interpretation of the impugned statute and the determination of constitutional remedies) in Part IV.

## II. AN AMBIVALENT JUDICIAL ATTITUDE TO FACTS

The role of facts is a peculiar feature of Canadian constitutional adjudication. Facts are ill-treated by the Supreme Court of Canada. They

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<sup>3</sup> “Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right.” *Martin*, *supra*, note 2, at para. 110.

<sup>4</sup> Justice L’Heureux-Dubé, in 2747-3174 *Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919, at para. 150, [1996] S.C.J. No. 112.

<sup>5</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 21, [2003] S.C.J. No. 63, citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 362, [1989] S.C.J. No. 14, referring to uncertainty as to the available *Charter* remedies.

are refused, ignored, called for, wished for, found in evidence, not found in evidence, imagined, invented, assumed, judicially noticed, reasoned, or taken for granted. They are treated in an unpredictable way. And yet they are extremely useful, for their presence or their absence, and their uncertainty or their insufficiency is used to justify judgments. It is not the fault of the law, it is not the fault of the judges, it is the fault of the facts.

The entrenchment of the *Canadian Charter of Rights and Freedoms*<sup>6</sup> has given rise to an explicit judicial concern for facts. Indeed, prior to the Charter, Canadian constitutional adjudication had for the most part been preoccupied with questions of law, and with the interpretation of statutes and of constitutional provisions, and the formal evaluation of their consistency. The consistency of a legislative provision with the Constitution was considered to be a question of law, actually “the most fundamental question of law one could conceive.”<sup>7</sup> Some litigants were even punished for bringing facts to the Court.<sup>8</sup> If the *Anti-Inflation Reference*<sup>9</sup> has been seen by some as a turning point, it is in reality the entrenchment of fundamental rights that has brought about a significant, if not paradigmatic, change in judicial methodology.

Indeed, early in the history of Charter litigation, the Supreme Court of Canada called for facts and for explicitly defined burdens of proof.

It is the responsibility of the party invoking a violation of rights and freedoms to prove its assertion. The Court will not make decisions in a factual vacuum, and insists “upon the careful preparation and presentation of a factual basis in most Charter cases,”<sup>10</sup> because “[t]he presentation of facts ... is essential to a proper consideration of Charter issues.”<sup>11</sup>

As a general rule, the party invoking the reasonableness of limits imposed upon rights will be required to bring “cogent and persuasive” evidence to that effect.<sup>12</sup>

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<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of *Constitution Act, 1982*, *supra*, note 1 [hereinafter “Charter”].

<sup>7</sup> *Martin*, at para. 28; the remark was made, however, in the context of a Charter litigation.

<sup>8</sup> See *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, at 325, where the appellant was refused his costs for the preparation of a factum.

<sup>9</sup> *Anti-Inflation Act, Re*, [1976] 2 S.C.R. 373.

<sup>10</sup> *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361, [1989] S.C.J. No. 88.

<sup>11</sup> *Id.*

<sup>12</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138, [1986] S.C.J. No. 7.

The Court thereby prescribes an essentially empirical approach to constitutional jurisprudence, enjoining parties who question the constitutional validity of statutes to provide facts to support their claims, and Parliament to rely on explicit factual foundations for legislative choices that are likely to infringe upon rights and freedoms.

This search for facts can rightly be seen as an indicator of judicial activism.<sup>13</sup> Constitutional litigation can become an arena where courts require evidence that is not available, and therefore go beyond their institutional boundaries.

Paradoxically, however, the emphasis on facts could lead to a trend of jurisprudence that presents itself as passive. For this evidence rhetoric enables the Court to declare that the violation has or has not been established, or that the reasonable nature of the infringement has or has not been demonstrated. It can thus distance itself from the decision, or even refuse to take responsibility for it: the Court does not *decide* the existence of an infringement on rights or the reasonableness of limits imposed by the state, but rather it merely *observes* those extraneous and pre-existing realities, in light of the evidence presented.

Aside from this sense of detachment, the reliance on a language of fact and evidence creates an illusion of certainty. The conclusion as to the existence of a violation of a given right can be expressed in terms of a factual observation. The consideration of the reasonableness of limits imposed on rights and freedoms is presented not as a subjective weighing of the social values at issue, but as an objective exercise in the assessment of empirical data, correlations, and causal relationships established by scientific studies. This recourse to a language of facts therefore also creates an illusion of neutrality: judges' values play no role in the objective analysis of data.

Judicial handling of questions of law is explicit. We may agree or disagree with the outcome, but we have, in principle, access to the relevant materials supporting the analysis, be it the text of a statute, the preliminary works, or the precedent cases.

The judicial treatment of facts is less transparent. The typical reader of a Supreme Court decision did not attend the hearing, nor did she read

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<sup>13</sup> Rogovin refers to a jurisprudential trend in constitutional law that requires empirical justification as a kind of judicial activism: Wendy M. Rogovin, "The Politics of Facts: The Illusion of Certainty" (1995) 46 *Hastings L.J.* 1723, at 1726.

the transcripts. All she will know of the facts will be what the Court included in its judgment. This situation renders any critical analysis quite difficult and thereby empowers the judges. We have no choice but to accept what they say about facts.

Moreover, constitutional litigation involves a particular species of facts. We are far from the traditional “who did what and when.”<sup>14</sup> It brings into play the rights and wrongs of social phenomena, like the physical correction of children, marijuana use, chronic pain syndrome as a disability, or electoral processes. The truth can rarely be found in the establishment of those facts; ascertaining likelihood remains a more realistic aim.

Facts concerning social realities are sometimes labelled social facts, or “legislative facts.” Despite the fact that they are in principle presented according to ordinary rules of evidence, the Supreme Court has ruled that they are subject to less stringent admissibility requirements,<sup>15</sup> regarding, for example, judicial notice.<sup>16</sup> However, the Court suggested caution when the question is reasonably open to dispute or could be dispositive of the case.<sup>17</sup> Consequently, we are basically left in the dark as to how social facts actually find their way into judicial reasoning.

In the past year, the Supreme Court made ample use of the inherent liberty it is afforded in the handling of social facts in constitutional cases. It discussed issues of electoral processes (see 1, following), marijuana use (see 2), physical correction of children (see 3), and chronic pain syndrome (see 4) in its own creative and unpredictable way.

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<sup>14</sup> The expression is from Davis, the father of the adjudicative/legislative facts distinction: K.C. Davis, “An Approach to Problems of Evidence in the Administrative Process” (1942) 55 *Harvard L. Rev.* 364, at 402-403.

<sup>15</sup> *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at 1099, [1990] S.C.J. No. 92.

<sup>16</sup> *R. v. Malmo-Levine (sub nom. R. v. Caine)*, [2003] 3 S.C.R. 571, at para. 28, [2003] S.C.J. No. 79 [hereinafter “*Malmo-Levine*”].

<sup>17</sup> *Id.*

### 1. *Figueroa*: Facts about Electoral Processes

In *Figueroa*,<sup>18</sup> the Court had to decide whether the rules of the *Canada Elections Act*,<sup>19</sup> prescribing that political parties had to nominate candidates in at least 50 electoral districts to qualify for certain benefits, were consistent with the democratic rights protected by section 3 of the *Canadian Charter of Rights and Freedoms*.

Fourteen years previously, the Court had refused to answer constitutional questions concerning certain rules of the *Elections Finances Act*,<sup>20</sup> which provided that the province would refund a portion of the campaign expenses of those candidates and parties with a fixed proportion of the votes in provincial elections.<sup>21</sup> The decision was justified on the basis of lack of evidence, and the Court took the opportunity to strongly emphasize the importance, if not the necessity, of presenting a factual basis for Charter litigations, and warned that in some cases, it would actually be irresponsible for the Court to attempt to resolve constitutional issues without a reasonable factual background.<sup>22</sup> The Court criticized the fact that submissions pertaining to the financing of political parties and the effect of contributions to campaign expenses were not supported by empirical findings.<sup>23</sup>

Consequently, it seemed reasonable to start reading *Figueroa* with the expectation of learning something about the practical effects of the 50-candidates limit. For example, one could have hoped to have found in the judgment some information about the kind of parties or ideologies that were *de facto* excluded from the statutory advantages. However, no such information can be found in the judgment.

The Supreme Court judgment contains no express discussion of factual issues and no formal presentation of evidence, nor does it refer to the fact-finding conclusions in the courts below. *Figueroa* is essentially an exercise in abstract reasoning on democratic values; for example, on the notion of “effective representation.” The Court considers that the

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<sup>18</sup> *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, [2003] S.C.J. No. 37 [hereinafter “*Figuerroa*”]. I will mainly discuss the majority’s opinion. The three judges from Quebec wrote a distinct concurring opinion.

<sup>19</sup> R.S.C. 1985, c. E-2.

<sup>20</sup> S.M. 1982-83-84, c. 45 [now R.S.M. 1987, c. E32].

<sup>21</sup> *MacKay v. Manitoba*, *supra*, note 10, at 361.

<sup>22</sup> *Id.*, at 366.

<sup>23</sup> *Id.*

two relevant questions to establish the existence of a section 3 violation are whether members and supporters of those parties who don't meet the 50-candidates threshold play a meaningful role in the electoral process, and whether the statutory restrictions at issue interfere with their capacity to play that meaningful role.<sup>24</sup> The Court seems to "reason" the facts, in an abstract and formalistic way. The Court writes about the relevant issues not in terms of empirical realities, but at the level of political philosophy discourse. The following affirmations illustrate the gist of the discussion of factual issues found in the judgment:

Large or small, all political parties are capable of introducing unique interests and concerns into the political discourse. Consequently, all political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy.<sup>25</sup>

Once again, the capacity of a political party to provide individual citizens with an opportunity to express an opinion on governmental policy and the proper functioning of public institutions is not dependent upon its capacity to participate in the governance of the country subsequent to an election.<sup>26</sup>

It is thus my conclusion that the members and supporters of political parties that nominate candidates in fewer than 50 electoral districts do play a meaningful role in the electoral process.<sup>27</sup>

Many individuals are unaware of the personal identity or background of the candidate for whom they wish to vote. In the absence of a party identifier on the ballot paper, it is possible that certain voters will be unable to vote for their preferred candidate.<sup>28</sup>

In our system of democracy, the political platform of an individual candidate is closely aligned with the political platform of the party with which she or he is affiliated, and thus the listing of party affiliation has a significant informational component.<sup>29</sup>

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<sup>24</sup> *Figueroa, supra*, note 18, at para. 38.

<sup>25</sup> *Id.*, at para. 41.

<sup>26</sup> *Id.*, at para. 44.

<sup>27</sup> *Id.*, at para. 46.

<sup>28</sup> *Id.*, at para. 56.

<sup>29</sup> *Id.*, at para. 57.

I want to stress here that my point is not that the Court is right or wrong in making these assertions. It is rather that, in the larger context of a jurisprudential approach requiring the parties to present their constitutional arguments on an evidentiary foundation, one can be legitimately surprised to encounter in the judgment so many abstractly reasoned facts.

I am not suggesting either that those factual affirmations were not based on evidence. Maybe they were. However the outside observer does not know, for the Court does not say.

Interestingly, the first allusions to evidence relate to its insufficiency. The Court first expressly discusses evidentiary issues when it evaluates the reasonableness of the limits imposed on democratic rights, within the meaning of section 1 of the Charter. After having confirmed that the burden of justification rests on the government, the Court alludes, more than once, to justificatory arguments that were not supported by evidence. Indeed, on numerous occasions, the Court will stress that elements presented by the government were not supported by evidence. Even though the Court concludes its section 1 analysis with a remark that gives the impression that it might have been satisfied with argumentation as much as with evidence,<sup>30</sup> one cannot escape the conclusion that in reality hard evidence was required.

The Court deplures, for example, the lack of evidence regarding the practical effect of the 50-candidates threshold on the cost-efficiency of the tax credit scheme,<sup>31</sup> its potential benefit to the public purse,<sup>32</sup> or its ability to prevent “third parties or lobby groups from nominating candidates for the sole purpose of obtaining the right to issue tax receipts for donations received outside the campaign period.”<sup>33</sup> The Court regrets

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<sup>30</sup> *Id.*, at para. 89: “The government has not advanced sufficient evidence to demonstrate that the election of a majority government would result in benefits that outweigh the deleterious effects associated with legislation that violates s. 3 for the purpose of ensuring that the electoral process results in the election of a government that would not otherwise be elected. Nor has it provided a reasoned basis on which to conclude that this is the case. In the absence of either evidence or argument to this effect, it is impossible to conclude that the legislation is justifiable in a free and democratic society.”

<sup>31</sup> *Id.*, at para. 68.

<sup>32</sup> *Id.*, at para. 70.

<sup>33</sup> *Id.*, at para. 76. In this paragraph, the French version is clearer in it being a requirement of evidence, and not simply of demonstration, that could, arguably, be abstract or logical.

that no evidence was provided to demonstrate that the obligation to submit audited financial statements, audited financial transactions returns, and audited election expenses returns was ineffective in preventing third parties from seeking registered party status for the sole purpose of abusing the tax credit scheme.<sup>34</sup> The Court takes notice of the lack of evidence concerning the influence of the threshold on the phenomenon of majority building or majority government, in that there was no evidence either of the threshold promoting it<sup>35</sup> or of the absence of the threshold preventing it.<sup>36</sup> Even more importantly, the Court notes the absence of evidence that minority “governments are less democratic than majority governments, or that they provide less effective governance than majority governments.”<sup>37</sup>

The Court seems to require the impossible: evidence of things that cannot be proved. Three judges who wrote separate opinions remarked on that aspect, questioning, among other things, “how one could prove empirically that one form of government is better than another.”<sup>38</sup>

The treatment of facts in constitutional cases is determined by vague rules, more guidelines, actually, as they were saying in the popular movie *Pirates of The Caribbean*. So the empirical trend in jurisprudence gives considerable liberty to the judges. The Supreme Court widely used it in *Figueroa*. It reasoned the facts necessary to come to a conclusion of violation of rights. And it regretted the lack of factual justification for such a limitation.

Such reasoning of facts, and such expressions of dismay regarding what is said to be a lack of evidence of necessary justificatory elements, certainly play an important rhetorical role. The conclusion has nothing to do with the political preferences of the judges; it has to do with the facts, especially with the government not having discharged its burden.

It permits what I would call a “not our fault” type of reasoning.

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<sup>34</sup> *Id.*, at para. 76.

<sup>35</sup> *Id.*, at para. 85.

<sup>36</sup> *Id.*, at para. 86.

<sup>37</sup> *Id.*, at para. 81.

<sup>38</sup> *Id.*, at para. 181.

## 2. *Malmo-Levine*: Facts about Marijuana Use

*Malmo-Levine*, a case relating to the constitutionality of the crime of possession of marijuana, is another interesting example of how the Supreme Court handles facts in constitutional cases. The majority decided that there was no violation of constitutional rights, and therefore it did not have to resort to the section 1 analysis. The burden of proof consequently rested on the parties asserting a violation of constitutional rights, and not on the state.

“The question before us is purely a matter of law,” the majority of the Court wrote from the outset.<sup>39</sup> This kind of affirmation helps the Court to keep its distance from the factual component of the case at hand. Facts are required, but may be discarded. Yet the Court always has the last word on questions of law.

It is, however, a case supported by what seems to be a considerable factual record. A 22-paragraph section entitled “Evidence of Harm” presents considerable factual material concerning what the Court calls “[t]he evidentiary issue at the core of the appellants’ constitutional challenge,” that is, the “harm principle” and the argument that possession is a victimless crime.<sup>40</sup>

One finds in that section admissions by the parties, and conclusions from the *Le Dain Report*,<sup>41</sup> from the trial judge in *Caine*<sup>42</sup> and from Parliamentary reports.

M. *Malmo-Levine* and others made limited admissions as to the harm caused by marijuana. Yet the mere idea of admission of social facts is bizarre. Whether or not social facts exist, they do so outside the courtroom, life, and personal experience of the parties. They are difficult to prove, or to identify with precision; scientists work hard attempting to ascertain even some aspects of them. How can an “admission” of those facts make them truer, or more real? How can two parties at trial admit and settle a controversial factual issue over which the scientific community is still struggling? I understand that it is convenient, for the purpose of judicial fact-finding. Yet ontologically, it does not make sense. One

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<sup>39</sup> *Malmo-Levine*, *supra*, note 16, at para. 23.

<sup>40</sup> *Id.*, at para. 40.

<sup>41</sup> Canada, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972) [hereinafter “*Le Dain Report*”].

<sup>42</sup> *R. v. Caine*, [1998] B.C.J. No. 885 (Prov. Ct.), *aff’d* (2000), 138 B.C.A.C. 218.

should only be authorized to admit to those facts of which one has personal knowledge.

From the *Le Dain Report*, the Court considers the four identified “major areas of social concern.”<sup>43</sup> It is unclear whether concerns expressed can be considered proven facts. Does an expression of concern, be it from the *Le Dain Report* as to “the role played by cannabis in the development and spread of multi-drug use”<sup>44</sup> prove anything?

The trial judge’s findings in *Caine*, on the basis of “the extensive evidence before her court,”<sup>45</sup> constitute the third source of evidence of harm. It is a more orthodox one.

Finally, the Court considered “a number of parliamentary reports issued since the decision of the courts below,”<sup>46</sup> about which it stated that it “may and do[es] take judicial notice.”<sup>47</sup> This idea of taking judicial notice of parliamentary reports is ambiguous. It could mean judicial notice of their existence, or of the facts they assert. The latter would be far-fetched, since the facts they state are not necessarily notorious, and may be the subject of dispute among reasonable persons.<sup>48</sup>

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<sup>43</sup> *Malmo-Levine, supra*, note 16, at para. 44.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, at para. 46.

<sup>46</sup> *Id.*, at para. 54.

<sup>47</sup> *Id.* Justice Arbour did not use this new evidence. Instead, she deferred to the trial courts’ findings, “absent a patent and overriding error on their part,” at para. 191. With regard to those evidentiary issues, she had a very classical approach. She wrote: “We have to analyse the constitutional questions raised in these appeals on the basis of these facts [findings of fact by lower courts]. Although criminalization of marihuana is a sensitive political issue and raises many social policy considerations, our analysis is circumscribed by the findings of fact of the trial judges, which are well-supported by an extensive record. These findings are the basis upon which we must decide whether, or to what extent, Parliament may criminalize under threat of imprisonment possession of marihuana for personal use and, alternatively, for the purpose of trafficking. We must determine whether, on the basis of these facts, constitutional requirements are met, with respect to both the division of powers issue and the *Charter* considerations,” at para. 201. “I do not think that we need to come to our own assessment of the facts,” she added at para. 191. A similar kind of orthodox deference to the fact-finding in lower courts can be found in the Court’s opinion in *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] S.C.J. No. 43, where, in a very short judgment of 55 paragraphs, one finds no less than 14 express confirmations of the trial judge’s treatment of facts.

<sup>48</sup> “Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.”: John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 1055.

But the weaknesses inherent in the foundation of the “evidence” considered in *Malmo-Levine* do not seem to be damaging to, or even significant for, the reasoning of the Court. Actually, it seems that, once again, beyond appearances, the facts do not play a very important role in the ultimate decision. Indeed, once it is accepted that the use of marijuana can cause limited damage to certain vulnerable groups in society, a conclusion that does not seem to be particularly controversial, the real argument concerns the legal importance and significance of this harm. It becomes an exercise in value judgment, a matter for discussion, argumentation, and decision. The answer will not be found in the evidence. It will involve a choice, made by a legitimate social actor.

The core of the judicial decision was the importance attributed to this kind of harm and the role it plays in the criminal law setting,<sup>49</sup> or as a possible principle of fundamental justice.<sup>50</sup> Those are questions of law and of abstract reasoning about criminal law, and have nothing to do with empirical discoveries. Indeed, the central aspect of the decision seems to be the value judgment associated with the importance and significance of the limited “harm” involved with the use of marijuana. The decision of the Court, to the effect that Parliament was entitled to exercise its criminal law power on the basis of a reasonable apprehension of harm, and its determination that the harm principle did not constitute a principle of fundamental justice, settled the appeal. It is impossible to imagine any kind of evidence that could have resulted in a different conclusion. The Court was right: it answered a question of law, and the facts, though called for as a general rule, could change nothing in the final outcome.

The whole factual decor is nevertheless a powerful rhetorical device. The Court had called for facts, and had even adjourned the appeal

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<sup>49</sup> The Court did indeed write that, under its criminal law power, “Parliament is entitled to act ... on reasoned apprehension of harm.” *Malmo-Levine*, *supra*, note 16, at para. 78. No important evidence will therefore be required.

<sup>50</sup> Once the Court decided that the “harm principle” was not a principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms* (para. 111), the evidence concerning the actual harm caused by the use of marijuana loses relevance. *Contra*: Arbour J., at para. 244: “I am of the view that the principles of fundamental justice require that whenever the state resorts to imprisonment, a minimum of harm to others must be an essential part of the offence,” and, at para. 256: “[H]arm to self does not satisfy the constitutional requirement that whenever the state resorts to imprisonment, there must be a minimum harm to others as an essential part of the offence.”

in order to be able to benefit from legislative fact-finding.<sup>51</sup> The presentation of a factual background may give the illusion of certainty; it may give the judgment the appearance of objective legitimacy. From the outset, one finds in the majority opinion, the following affirmations: “[a]ll sides agree that marihuana is a psychoactive drug which ‘causes alteration of mental function’ ... Certain groups in society share a particular vulnerability to its effects.”<sup>52</sup> It looks more like an introduction to a medical treatise on drugs than the beginning of a judgment on the constitutionality of a criminal prohibition. The Court presented facts and demonstrated that it was well-informed and understood what it was writing about. The Court then proceeded with its value judgments. It is a case where the “empirical observation served a rhetorical purpose, being pertinent only insofar as it advanced [the] interpretive judgment, and empirical evidence to the contrary would surely not have influenced the outcome.”<sup>53</sup>

### 3. *Canadian Foundation: Facts about Physical Correction of Children*

The second paragraph of the Court’s judgment in *Canadian Foundation for Children, Youth & the Law*<sup>54</sup> tells us that a “substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable presented in this appeal, gives clear content to s. 43,” the *Criminal Code*<sup>55</sup> provision justifying certain forms of physical correction to children. One therefore has the legitimate impression that by reading the judgment of the Court one will learn about the social phenomenon of the physical discipline of

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<sup>51</sup> The Court had even written an interlocutory judgment *Malmo-Levine v. R.*, Supreme Court of Canada, 13 December 2002, in which it adjourned the case. Aware that parliamentarians would soon examine the issue of the social facts of interest to them in the case, the Court wrote that it would await their findings.

<sup>52</sup> *Malmo-Levine*, *supra*, note 16, at para. 3.

<sup>53</sup> David L. Faigman, “Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation” (1991) U. of Pa. L. Rev. 540, at 546, about a remark made by Chief Justice Marshall in 1824, to the effect that Americans understood the word “commerce” to include “navigation.”

<sup>54</sup> *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 2, [2004] S.C.J. No. 6 [hereinafter “*Canadian Foundation*”].

<sup>55</sup> R.S.C. 1985, c. C-46.

children. One expects a judgment that meets the jurisprudential requirement of presenting Charter litigation cases in a proper factual setting. One is particularly hopeful, when one reads that “the record of expert testimony in this litigation is voluminous.”<sup>56</sup>

Yet one learns very little about facts in *Canadian Foundation*. Despite the fact that from the beginning reference is made to a “substantial social consensus” and to “comprehensive and consistent expert evidence,” nowhere in the judgment does one find a thorough presentation of the evidence, nor the fact-finding conclusions of the lower courts. Occasionally, some piece of evidence appears in the judgment, and with this, we must be satisfied.

The majority judgment interprets the relevant provision of the *Criminal Code* in the light of a perceived social consensus and expert evidence.<sup>57</sup> For example, there is apparently agreement among experts that corporal punishment of children under the age of two, and of teenagers, as well as the use of objects or slaps or blows to the head, are harmful.<sup>58</sup> The Court supported this affirmation with a laconic reference to the trial decision. We are not told who those experts are, or where they published the results of their studies. We are simply told that these are the conclusions of expert research. We are told as well about the existence of a “contemporary social consensus” as to what teachers should be allowed to do.<sup>59</sup> This information about social consensus, though of a factual nature, is not supported by any kind of authority, except the affirmation of the Supreme Court of Canada. It is simply stated.

The proposed judicial interpretation of section 43 is supposedly legitimized by expert evidence and social consensus, rather than by mere authority. The problem is that the expert evidence is not presented nor summarized, and the factual support for the assertion of a social consensus is not expressed. Moreover, the affirmation of a social consensus is weakened by comments made by Arbour J., who, presumably on the basis of the same evidence, referred to the “ongoing debate in society about the appropriateness and effectiveness of the use of corporal

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<sup>56</sup> *Canadian Foundation*, *supra*, note 54, at para. 194.

<sup>57</sup> *Id.*, at para. 36.

<sup>58</sup> *Id.*, at para. 37.

<sup>59</sup> *Id.*, at para. 38.

punishment by way of correction”<sup>60</sup> and to the fact that judges themselves allude to “the lack of consensus in this area of the law,”<sup>61</sup> and finally affirmed that “[c]orporal punishment is a controversial social issue.”<sup>62</sup>

The majority of the Court affirmed the constitutional validity of the *Criminal Code* provision justifying the physical correction of children, as limited by the interpretation it suggests. The Court justified this particular interpretation with empirical facts regarding what is reasonable and corrective. It based its conclusion on what it said was the object of social and expert consensus. This rhetorical device is intended to give the illusion of certainty, and objectivity. The lack of explicit sources for those affirmations, however, dramatically weakens the argument.

#### 4. *Martin*: Facts About Chronic Pain Syndrome

The introductory paragraph of the *Martin* and *Laseur* case creates the same expectation of learning important facts about chronic pain syndrome. A provincial regime of workers’ compensation was challenged as having violated the equality rights of workers with chronic pain syndrome. The Court wrote that the syndrome is “generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques.”<sup>63</sup> It added that “there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.”<sup>64</sup> This remark could be understood as taking for granted a fact in issue, that is, the existence of disability on the basis of chronic pain syndrome. In the context of a jurisprudential approach insisting on factual foundations for constitutional challenges, one could legitimately expect to learn more about the empirical reality of chronic pain syndrome. Despite the warning that courts are not “the appropriate forum for an evaluation of the available medical evidence concerning

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<sup>60</sup> *Id.*, at para. 173.

<sup>61</sup> *Id.*, at para. 182.

<sup>62</sup> *Id.*, at para. 185.

<sup>63</sup> *Martin*, *supra*, note 2, at para. 1.

<sup>64</sup> *Id.*

chronic pain for general scientific purposes,<sup>65</sup> one could at least hope to gain a bit of knowledge about this syndrome, for “legal purposes.” Here again, one will be disappointed, and to a certain extent, one will feel cheated.

As was the case in *Canadian Foundation, Martin* lacks a formal presentation of the evidence available to the Court, and of the fact-finding conclusions of lower courts. Bits and pieces of factual information emerge sporadically, apparently as required. For example, the Court laconically referred to “the limited evidence before [it].”<sup>66</sup> Or it alluded to medical reports that mention inaccurate negative assumptions toward chronic pain sufferers,<sup>67</sup> that recognize the psychological component of the syndrome<sup>68</sup> or which conclude that “chronic pain frequently evolves into a permanent and debilitating condition.”<sup>69</sup> We learn at the end of the judgment that the Court had “considerable scientific evidence commissioned by ... workers’ compensation boards.”<sup>70</sup> We find out that the evidence did not reveal that a significant financial burden was imposed on the provincial fund by chronic pain syndrome claimants.<sup>71</sup> So, while there was sufficient discussion of evidence for us to conclude that the Court had evidence before it, and that it knew what it was writing about, the discussion was far too limited to enable us to be critical of its use and analysis by the Court. It is a powerful strategy that disempowers the lay reader, preventing an enlightened critical appraisal of the judicial processing of evidence.

Certain issues with important factual components seem to be settled in a formalistic way. For example, the central affirmation according to which “[t]he distinction between the claimants and the comparator group was made on the basis of the claimants’ chronic pain disability, i.e., on the basis of disability”<sup>72</sup> was made without any explicit connection to evidence in its support. The existence of a chronic pain disability is, however, of fundamental importance, and could easily have been

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<sup>65</sup> *Id.*, at para. 2.

<sup>66</sup> *Id.*, at para. 90.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at para. 97.

<sup>70</sup> *Id.*, at para. 113.

<sup>71</sup> *Id.*, at para. 109.

<sup>72</sup> *Id.*, at para. 80.

considered as raising a crucial and controversial factual issue. Nevertheless it is established in only one sentence.

The existence of a historical disadvantage is an inherently factual issue, usually understood to be of central importance in equality cases. Yet it would have probably been difficult to establish with regard to chronic pain syndrome. The Court avoided the issue in *Martin* by refining the law. Indeed, the Court decided, as a question of law, that this contextual factor is neutral when “the claimants belong to a larger group ... who have experienced historical disadvantage or stereotypes.”<sup>73</sup> The Court went further by adding that where, as in the case before it, the criteria of lack of correspondence is at the heart of the equality analysis, it may render the relative disadvantage investigation inappropriate.<sup>74</sup> The difficulty of determining a factual issue is hereby avoided by changing the legal analysis.

Interestingly, the lack of correspondence between the actual needs, capacities, and circumstances of chronic pain sufferers and the statutory treatment they are afforded is established without any requirement of an empirical description of the former. Indeed, the blanket exclusion from the general compensation scheme was found to lack the necessary correspondence to the special needs and actual capacities of the claimants, whatever they may be. A bare formal reasoning could rationally dispose of this issue.

The Court decided the dignity component of the equality rights analysis in a purely formalistic and abstract way. Indeed, the exclusion of chronic pain sufferers was construed by the Court as sending “a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society.”<sup>75</sup>

Under the section 1 analysis, the blanket exclusion from regular benefits, and the comparison with other provincial statutory regimes that provide for more personalized treatments, were deemed sufficient to conclude that there had been a failure to meet the minimal impairment criteria.

*Martin* is an equality rights case involving a particular medical condition about which scientific knowledge is uncertain. The Court main-

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<sup>73</sup> *Id.*, at para. 88.

<sup>74</sup> *Id.*, at para. 89.

<sup>75</sup> *Id.*, at para. 101.

tained the apparent requirement of a factual foundation for constitutional challenges, but in reality found ways to settle the issue despite the lack of necessary information. The illusion of certainty is kept alive, but the fiat aspect of the judicial decision cannot be mistaken.

Discussion of social facts continued to be present in last year's constitutional cases, and the Court seems to have become bolder in its use of them. The Court reasons the facts or deplors their absence. It sometimes formally states them; it sometimes uses them on an *ad hoc* basis. It sometimes ignores them and rather chooses to proceed with legal reasoning and value judgments.

It seems as though, after the desperate call for facts triggered by anxiety in the face of the enormous responsibility of applying a charter of rights, the Court now feels more confident. It still needs facts and will use them at least at a rhetorical level, but it no longer needs to make grandiloquent speeches about factual basis in constitutional cases. The Court reasserts the power to make constitutional decisions as matters of law and value judgments. Yet this comes with an obligation to take responsibility.

### III. SOME CONFUSION BETWEEN RULES AND PROVISIONS

Bizarre affirmations find their way into constitutional cases. Indeed, we will encounter the possibility of “reading in exceptions” to criminal offences<sup>76</sup> (meaning to add exclusions?), or of “non-literal infringements” of constitutional rights.<sup>77</sup> The use of such peculiar wording suggests there must be something wrong in the way we think about these issues.

Among other attributes, Italians have great art, great shoes and great food. Interestingly, they have also developed a sophisticated theory of constitutional law that could help us better understand judicial methodology.<sup>78</sup> Some Italian authors suggest a distinction between a norm (or rule) — *una norma*<sup>79</sup> — and the provision that expresses it — *una*

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<sup>76</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3.

<sup>77</sup> See *infra*, discussion of *Figueroa*.

<sup>78</sup> I must admit here that, because of my linguistic limits, I have no direct access to Italian caselaw or doctrine. I have to use French texts.

<sup>79</sup> “[L]a norme n’est pas, à l’inverse de la disposition, une *chose*, mais un *sens*... [L]’appréhension de la norme n’est possible que par une opération intellectuelle de com-

*disposizione*.<sup>80</sup> They insist on the very illuminating idea that one should be clear whether judicial review on constitutional grounds relates to rules or to statutory provisions.<sup>81</sup>

If this confusion between a rule of law and its formal expression in a legislative text could be avoided, perhaps we would not have to “read in” exceptions, or qualify infringements of rights as being literal or non-literal.

Constitutional adjudication is mainly about rules. For example, statutory rules of law must be consistent with the rules of law flowing from the Constitution. If they are inconsistent, the former will be of no force or effect. Constitutional adjudication is therefore about rules, possible inconsistencies between them, and decisions as to which should prevail, and to what extent.

A rule of law is not the same thing as the provision that articulates it, that is to say, its material expression in a statute.<sup>82</sup> One should not confuse the two. Common law systems are founded on this distinction: statutory rules of law have a literal expression in Parliament’s Acts, while courts will declare common law rules that don’t have this kind of formal support.<sup>83</sup> There are therefore some rules with no legislative

préhension.... L’activité d’interprétation permet donc d’extraire des dispositions les normes qu’elles contiennent à l’état latent.... [P]ar conséquent, la norme, c’est la disposition interprétée” : Thierry Di Manno, *Le juge constitutionnel et la technique des décisions « interprétatives » en France et en Italie* (Paris & Aix-en-Provence: Economica et Presses universitaires d’Aix-Marseille, Collection Droit public positif, 1997) at 51.

<sup>80</sup> “Par disposition, il faut entendre acte, texte ou document normatif au sens lexicologique de ces termes, c’est-à-dire comme regroupant des formules linguistiques textuelles. ... En définitive, on retiendra que la disposition est un énoncé ou une formule linguistique. Elle se conçoit, en dernière analyse, comme l’instrument, l’enveloppe, le contenant de la norme”: *id.*, at 49-50.

<sup>81</sup> “L’objet du jugement de constitutionnalité repose, traditionnellement, en Italie, sur une distinction établie par la Cour constitutionnelle et la doctrine italiennes, entre disposition et norme”: Jean-Jacques Pardini, *Le juge constitutionnel et le « fait » en Italie et en France* (Paris & Aix-en-Provence: Economica et Presses Universitaires d’Aix-Marseille, Collection Droit public positif, 2001) at 41.

<sup>82</sup> “In handling rules it can be important to realize that the substance of the rule and the syntax of its formulation are different matters.... We talk quite naturally of reading, drafting, breaking or writing down a rule.... [S]ometimes we may fall into the trap of confusing the rule with its physical expression.”: William Twining & David Miers, *How to Do Things with Rules*, 2d ed. (London: Wendenfield and Nicolson, 1982) at 137, 148.

<sup>83</sup> Twining and Miers discuss this distinction between a rule and its expression. They write: “First, there are rules expressed in fixed verbal form and rules not expressed in fixed verbal form. Some, such as statutory rules, are expressed in a particular form of words which

provision,<sup>84</sup> and, conversely, some provisions that do not express a rule.<sup>85</sup> A rule of law belongs to the world of meanings, of ideas, of abstractions. The statutory provision that expresses it belongs to the world of visible signs. We can see the provision, we can read it, but we still have to understand the rule it expresses. It is unfortunately all too easy and common to confuse a rule of law with its literal expression. Yet we must try to avoid this confusion.

This methodological confusion between a rule and the provision that formally expresses it seems to be present in recent constitutional cases. *Figueroa* fails to distinguish between the constitutional protection of certain democratic rights and its formal expression in section 3 of the *Canadian Charter of Rights and Freedoms* (see 1, following). It is not clear whether the “reading down” or “reading in” one finds discussed in *Canadian Foundation* refers to the text of section 43 of the *Criminal Code* or the rule it expresses (see 2, below).

### 1. *Figueroa*: A “Non-Literal Infringement”?

Confusion between a rule of constitutional law and its material expression in the text of the Constitution — in this case section 3 of the *Canadian Charter of Rights and Freedoms* — seems to underlie some ambiguous comments made by the Court in *Figueroa*. One finds in that case a discussion of the democratic rights protected by the Charter. The Court seeks to clarify that the protection provided by section 3 goes beyond the mere acts of voting or of declaring oneself a candidate in an election. It includes a right to effective representation, which can involve important and diverse elements.

The majority judgment refers to the possibility of legislation being “inconsistent with the express language of s. 3,”<sup>86</sup> but insists that “*Charter*

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has official status, so that it is not open to interpreters to change the wording.... Other rules ... may have been expressed differently at different times, may have been only partly articulated or may never have been expressed in words at all.”: Twining & Miers, *id.*, at 143.

<sup>84</sup> For example, there is no formal provision expressing a common law rule.

<sup>85</sup> For example, one can think of a statutory provision providing for a definition. A definition is not a rule. To reconstruct the rule, one may therefore have to use more than one provision.

<sup>86</sup> *Figueroa*, *supra*, note 18, at para. 33.

analysis requires courts to look beyond the words of the section,<sup>87</sup> since a violation of democratic rights can result from the way “legislation affects the conditions in which citizens exercise those rights [to play a meaningful role in the electoral process].”<sup>88</sup>

In much the same way, LeBel J. compares “literal prohibitions”<sup>89</sup> “directly clashing with [s. 3’s] plain language”<sup>90</sup> with “non-literal infringement of s. 3”<sup>91</sup> “dealing with the additional protections that must implicitly be included if the literal language of the section is to be given full effect.”<sup>92</sup>

With all due respect, I don’t think that it is useful to refer to and distinguish between literal or non-literal infringements of rights. It confuses things, and it gives too much importance to the words of the constitutional provision. We must interpret the rule, and the scope of the right it protects. We must then decide whether there is, or is not, an infringement of the protected right. We must give meaning to the rule, that is, the constitutional protection of a right. The rule is expressed with words in a constitutional provision. The meaning held to be correct will perhaps be broader than the core and ordinary meaning of the words used.

The supremacy of the Charter is about rules, not about words. Inconsistencies exist between rules, not between words or languages. There is no such thing as a “literal prohibition.” There are prohibitions, within a certain ambit, and they are expressed with words.

There is no denying the enormous power exercised in the interpretation of constitutional rules. The rule is not there, pre-existent, waiting to be discovered and declared. The interpreter will give meaning to the rule, but this remains a different question.

The point made here is that the rule and the words used to express it in a constitutional provision are not the same thing. The latter is only a material way of expressing the former.

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<sup>87</sup> *Id.*, at para. 19.

<sup>88</sup> *Id.*, at para. 33.

<sup>89</sup> *Id.*, at para. 126.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, at para. 178.

<sup>92</sup> *Id.*, at para. 131.

## 2. *Canadian Foundation*: A Case of “Reading In,” or “Reading Down”?

The acknowledgement of the fundamental distinction between a rule and its textual expression in a legal provision can perhaps help clarify judicial statements about constitutional remedies. Indeed, one finds logical inconsistencies in the use of expressions such as “reading in” or “reading down,” not to mention their unpredictable French translations. Here, again, much seems to be lost in translation.<sup>93</sup>

*Canadian Foundation* is an illustration of this confusion. Chief Justice McLachlin, writing for the majority, confirmed the constitutional validity of section 43 of the *Criminal Code*, concerning the physical correction of children. The conclusion rested on a very restrictive interpretation of the rule expressed by section 43. Given her conclusion of constitutional validity, she did not have to discuss the remedial issue. Three dissenting judges came to the conclusion that the provision violated constitutional rights. Justice Arbour was of the view that striking down the provision was the appropriate remedy.<sup>94</sup> Justice Deschamps discussed, but rejected, the possibility of a remedy of “reading down.”<sup>95</sup> Justice Binnie would have struck out of the provision the references to “schoolteacher” and “pupil.”<sup>96</sup> He wrote that what he called the “extensive ‘reading in’ exercise” undertaken by the Chief Justice would have been more properly dealt with at the remedial level.<sup>97</sup>

So, in the hypothesis that there was a constitutional violation, was it a case of remedial “reading down” or of “reading in”? Can both occur at the same time? Or, more pragmatically, was it a case of striking out words?

It all depends on whether we are discussing the rule, or the words of the legislative provision that express it. If we are referring to the rule itself, which is considered by some to be too broad since it applies to cases that bring about constitutional violations, then it is a case of

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<sup>93</sup> Danielle Pinard, “Les sanctions d’une règle de droit législative incompatible avec la *Charte canadienne des droits et libertés*: le *reading in*, le *reading down*, l’interprétation large, l’interprétation atténuée, etc.!” (2003) R. du B. (numéro special) 412.

<sup>94</sup> *Canadian Foundation*, *supra*, note 54, at para. 194.

<sup>95</sup> *Id.*, at para. 243.

<sup>96</sup> *Id.*, at para. 76.

<sup>97</sup> *Id.*, at para. 103.

reading down, or limiting the scope of the rule. If, on the contrary, we are referring to the words of the provision that express it, it can be a case of reading in, that is, of adding words that limit the scope of the rule. Or again, as Binnie J. suggested, it could be a case of striking out words.

The point is that we have to be clear about what we are talking about. Ideally, in the same community, we should share the same vocabulary when we talk about things, such as constitutional remedies.

I would suggest that the emphasis should be placed on rules, since they are what inconsistency is about. Inconsistency between rules is at the heart of constitutionalism. The manner in which a rule is semantically expressed in a statutory provision is of secondary importance. The semantic expression of the remedy of reading down or reading in, that is, the necessary modification of the wording of a statutory provision it may require is, in the same way, of secondary importance.<sup>98</sup>

#### IV. INTERPRETATION OR REMEDY?

The interpretation of a statute and the imposition of a remedy for a constitutional violation are different steps in the constitutional adjudication process, and should be kept as such. They come into play at different phases, involve different basic principles, and are open to different kinds of criticism.

The interpretation of statutes is the ordinary day-to-day work of the courts. The accepted rhetoric under which this exercise occurs proceeds as follows: courts attempt to find Parliament's intent as expressed in the wording of the statute. Courts are therefore mere interpreters of another state actor's written decisions. As such, they must faithfully search and give effect to this other actor's will. Parliamentary sovereignty is the

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<sup>98</sup> See Pinard, *supra*, note 93. The Italian solution is as follows: "Selon cette ligne de conduite, la Cour constitutionnelle rend une décision qui a pour objet la disposition de loi en tant que document lorsque l'on constate une correspondance univoque entre celle-ci et la norme que l'on déduit. En effet, dans ce cas, la norme est indissolublement liée au texte; l'objet de la décision ne peut, donc, être que le texte, qui ne saurait survivre, par hypothèse, à l'amputation de la norme. En revanche, lorsque cette correspondance entre la disposition et la norme est rompue, lorsque le texte ne génère pas une seule norme mais plusieurs, la décision constitutionnelle pourra porter sur les normes. Dans ce cas, en effet, le texte n'étant plus attaché à une seule norme, il pourra subir, par exemple, l'ablation d'une norme sans nécessairement périr avec elle. La capacité 'normogène' de la disposition pourra lui permettre de générer une norme conforme à la Constitution.": Thierry Di Manno, *supra*, note 79, at 62.

key concept for statutory interpretation. Judicial interpretation of statutes will sometimes be criticized in terms of being more or less plausible. Its legitimacy will however rarely be put into question. Interpretation is what judges do.

The imposition of a constitutional remedy comes into play at a different phase of the process, and under different guiding principles. A remedy is imposed when a statute has been interpreted, held to be in violation of rights, and not justified as a reasonable limit. It is prescribed by the principle of the Primacy of the Constitution. It is imposed in violation of parliamentary intent. The legitimacy of judicial review, and particularly of the judicial crafting of constitutional remedies concerning statutes, gives rise to critical scrutiny and comments.

The Supreme Court of Canada played an active role in muddling these issues when it chose to use the same words to express different things. I am referring here to the expressions “reading down” and “reading in,” which are now used in Canadian law either to refer to interpretative devices, or to constitutional remedies.<sup>99</sup>

At a very basic level, the reading down of statutes has always meant narrowing the potential meaning of words in order to respect what was understood to be the true legislative intent. Later on, the expression “reading down” was read down to mean the interpretation of a statute with the aim of preserving its constitutional validity, when the words used can in fact support such an interpretation.<sup>100</sup> In the same way, “reading in” has been understood as an orthodox feature of statutory interpretation simply rendering the particulars of legislative intent more explicit.

Since the *Schachter* case,<sup>101</sup> however, reading down and reading in have been given new meanings. They are now the appellations of constitutional remedies that allow judges to subtract or to add to statutes whose scope is held to be unconstitutionally too wide or too narrow.

The same words are therefore now used to refer to true interpretation and to constitutional remedies. This confusion blurs the conceptual integrity of each reality.

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<sup>99</sup> For a critical discussion of this confusion, see Pinard, *supra*, note 93.

<sup>100</sup> See, for the classical formulation in a separation of powers case, *McKay v. R.*, [1965] S.C.R. 798, at 804. For an application of this statutory interpretation principle in a Charter case, see, for example, *R. v. Sharpe*, *supra*, note 76, at para 33.

<sup>101</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68.

At a practical level, such confusion can be deliberate, and used in order to be able to remedy a statute under the guise of interpretation. And thereby neutralize critics of judicial activism.

### 1. *Canadian Foundation: To Remedy Through Interpretation?*

The Court recently gave us, in *Canadian Foundation*, the textbook material for a discussion of this issue of the distinction between interpreting and imposing a remedy.

The majority wrote a statutory interpretation judgment. It interpreted section 43 of the *Criminal Code* in such a way as to enable it to pronounce its constitutional validity. The Court was, at the very least, quite inventive in interpreting the provision as not justifying, for instance, physical correction of children under two years of age or of adolescents, or degrading, inhuman or harmful conduct, or the use of objects or blows or slaps to the head.<sup>102</sup>

Three dissenting judges disagreed with the way the majority interpreted section 43. They would have given the provision what they considered to be its full and intended scope, and would have held it to be constitutionally invalid.

Justice Binnie was of the opinion that the majority had “read significant limitations into the scope of s. 43 protection,”<sup>103</sup> and that “[s]uch an extensive ‘reading in’ exercise, if appropriate, should take place only after an infringement of s. 15(1) is acknowledged, and the Court turns to the issue of the s. 1 justification and the appropriate remedy.”<sup>104</sup>

Justice Arbour strongly criticized what she called “the reading down of a statutory defence”<sup>105</sup> undertaken by the majority, as being contrary to the traditional and historical role of the courts in criminal processes. She denounced the fact that the majority had rewritten the provision in order to validate it.<sup>106</sup>

Justice Deschamps, in recognizing that there exists a principle of statutory interpretation that favours constitutional validity, was of the

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<sup>102</sup> *Canadian Foundation, supra*, note 54, at para. 40.

<sup>103</sup> *Id.*, at para. 81.

<sup>104</sup> *Id.*, at para. 103.

<sup>105</sup> *Id.*, at para. 138.

<sup>106</sup> *Id.*, at para. 139.

opinion that the provision of the *Criminal Code* could not support the restricted scope proposed by the majority of the Court.<sup>107</sup> She wrote that the Court could not “read the section down to *create* a constitutionally valid provision.”<sup>108</sup>

I tend to agree with the dissenters. I don’t understand why the majority of the Court proceeded the way it did. It is clear that it could have done otherwise. Indeed, it could have held that the provision was intended to be given its full literal scope, but that consequently some of its applications were unconstitutional and had to be read down in accordance with section 52(1) of the *Constitution Act, 1982*. This approach would have been more straightforward.

The path chosen by the Court may have something to do with the debate about the legitimacy of judicial review.

Judicial interpretation of statutes *is* legitimate, at least formally. It is what judges do. It is part of the magical category of so-called “questions of law” about which judges have the first and the last word. Judges have judicial notice of the law, aren’t we told? Judicial interpretation of statutes attracts much less attention, concern, or interest than judicial declaration of unconstitutionality of Parliament’s will.

If the Court, as a general approach, wished to opt for an attitude of restraint, or at least give the appearance of such an attitude, while still exercising some power, the statutory interpretation technique might prove quite useful. The judgment of the Court in *Canadian Foundation* certainly appears to reflect an attitude of restraint. The statutory provision is held to be consistent with Charter rights. At a formal level, the Court is telling Parliament that it was correct, that it acted within its constitutional jurisdiction. Thus the Court can pretend to play a passive role. This is especially true since the analysis begins and ends with the scrutiny of the consistency between the constitutional rights and the statutory provision, a stage where the onus rests on the party alleging the violation, and not on the state. Consequently, the state will not have to prove anything.

At a purely formal level, the critics of judicial activism can be satisfied with such a confirmation of legislative choices. Yet, to use the classical and useful distinction, the issue has been settled as a question

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<sup>107</sup> *Id.*, at para. 215.

<sup>108</sup> *Id.*

of law, that is, the proper interpretation of the statutory provision. This is a field where the Court can exercise full sovereignty. Within this formal attitude of restraint, the Court will therefore decide what should be the correct scope of the justification provided by the *Criminal Code*. And, as Arbour J. wrote, a lot of work will be required to make the provision constitutionally sound.<sup>109</sup> Hence, precise and effective judicial activism will be exercised with the appearances of a very passive and humble attitude of deference for legislative choices.

The confusion between interpretation and remedy can thus be useful for the judges.

## V. CONCLUSION

Judicial activism at the methodological level is a defining feature of Canadian constitutional adjudication. The way the Court is going about its business is sometimes mysterious.

The handling of facts seems to some extent unpredictable. Rules of law and their textual expression in provisions are sometimes confused. Remedial work is done in the guise of interpretation.

Uncertainty in the methodological approach allows the Court to exercise an important and relatively hidden power.

The confirmation of the constitutional validity of a statutory provision can formally be seen as a manifestation of judicial restraint. However, emphasis on methodology reveals that in reality it is an act of activism when the confirmed rule is a judicially rewritten one.

I understand that conceptual elegance is not everything. And I accept that logical consistency must not trump other values. But still, communication within a particular community requires some shared and plausible meanings.

The need for flexible rules for facts should not become the justification for arbitrariness.

A rule is not a written text.

To interpret is not to remedy.

To stay within its institutional boundaries does perhaps mean that the Court must make use of intelligible tools.

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<sup>109</sup> *Id.*, at para. 190.