

A Level Playing Field for Classical Liberalism: the Abolition of the Court Challenges Program Empowers a Diversity of Perspectives on Freedom and Equality

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Introduction

In 1982, Canada abandoned its parliamentary democracy for an American model of constitutional democracy in which unelected, and hence unaccountable, judges exercise substantial legislative power. Before the *Canadian Charter of Rights and Freedoms*¹ became the supreme law of the land, Canada's Parliament and provincial legislatures were essentially sovereign, limited only by the federal-provincial division of powers in sections 91 and 92 of the *Constitution Act, 1867*.² Activism and advocacy in the democratic political arena were the only ways to bring about policy change. But since 1982, Canadian judges — like their United States (U.S.) counterparts — play a very active role in shaping public policy on a wide range of issues, many of them complex and controversial.

Not surprisingly, this shift of power from legislatures to courts has resulted in the emergence of interest groups that use litigation to advance their public policy agendas. The first twenty-five years of *Charter* litigation were dominated by the Women's Legal and Education Action Fund (LEAF), Equality for Gays and Lesbians Ev-

erywhere (EGALE), and other recipients of tax dollars through the Court Challenges Program. The abolition of the Court Challenges Program has created a level playing field for all public interest litigants, including those with a classical liberal perspective on freedom and equality.

The U.S. Experience with Constitutional Democracy

Canada's experience with constitutional democracy is only twenty-five years old. This is why some people still argue that *Charter* decisions are matters of law, which have absolutely nothing to do with politics, and that a judge's personal beliefs and philosophy are irrelevant to judicial decision making.

These arguments are heard less frequently in the U.S., because Americans have lived with their constitutional democracy for over 200 years. They know that court decisions are inherently, necessarily, and unavoidably *political*, in the sense that judges often determine the substance of public policy. This was exemplified in the 1857 U.S. Supreme Court case *Dred Scott v. Sandford*,³ which held that persons of Afri-

can ancestry could never attain U.S. citizenship. Those who would think that judges are more enlightened than elected representatives should consider the words of Chief Justice Roger B. Taney, who described blacks as “beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.”⁴ With *Dred Scott*, it should be noted, judges halted the progress politicians had been reaching through various agreements to stop the spread of slavery into new territories. With *Dred Scott*, the U.S. Supreme Court struck down the 1820 Missouri Compromise,⁵ a law enacted by Congress.

In recognition of the courts’ power to shape public policy, numerous legal foundations have arisen with various and competing philosophical views. The American Civil Liberties Union (ACLU) is one of the oldest, largest, and best known. In opposition to the ACLU, conservative and libertarian legal foundations also put their views before the courts. For example, the Institute for Justice (IJ) represents individuals in their fight for private property rights, economic liberty, freedom of speech, commercial freedom, racial equality, and the right of parents to raise their children free from state interference. IJ advances a libertarian philosophy with a “merry band of litigators”⁶ providing the best justice that money cannot buy.

Legal foundations in the U.S. fight public policy battles in the courtroom in a way similar to the way political parties debate public policy in the electoral arena of public opinion. For example, in *Zelman v. Simmons-Harris*,⁷ the ACLU and IJ clashed in court because an Ohio school voucher program offered parents a choice of public, private, or religious schools. The ACLU contended that this violated the First Amendment of the U.S. Constitution’s separation of church and state. IJ argued for wide parental choice, including religious and non-religious schools. In a 5:4 decision, the U.S. Supreme Court accepted IJ’s arguments and upheld the program as constitutionally valid.

The Relevance of Judges’ Philosophies

After more than 200 years of constitutional democracy, Americans have no qualms about describing their judges as liberal or conservative, or with other labels. In the U.S., it is self-evident that a judge’s political and philosophical beliefs are bound to influence his or her judicial decisions. A judge’s personal opinions about human nature, the appropriate role of government, and life’s ultimate meaning and purpose, are bound to influence his or her interpretation of constitutional law. A claim to decide cases “only according to law” sounds noble, whether made north or south of the border. However, it is judges who decide what law is, such that judges are creating the higher authority to which they claim to submit. Inevitably and unavoidably, judges decide cases within the context of their own beliefs, prejudices, and experiences. This is why U.S. Senate confirmation hearings in respect of judicial appointments are often politicized and acrimonious: judges do *not* merely decide cases “according to law.”

With time, Canadians will likely become less reluctant to analyze and categorize their judges. In this regard, the Canadian Constitution Foundation released *Judging the Judges* just prior to the twenty-fifth anniversary of the *Charter* in April 2007.⁸ This first-of-its-kind study analyzes Supreme Court of Canada decisions affecting citizens’ personal and economic liberty, and equality before the law. *Judging the Judges* reveals that Canadian judges, like their U.S. counterparts, manifest significant, predictable, and measurable difference in their approaches to constitutional law issues, which affect public policy.

For example, retired Justice John Major consistently adopted a wide and liberal interpretation of freedom of speech, freedom of religion, freedom of association, and other individual rights.⁹ In stark contrast, retired Justice Claire L’Heureux-Dubé consistently adopted a narrow and restrictive view of the fundamental freedoms set out in section 2 of the *Charter*, ruling in favour of the government, and its power over individuals’ lives.¹⁰

In *Harper v. Canada (Attorney General)*,¹¹ Justice Major rejected new amendments to the *Canada Elections Act*¹² giving political parties a virtual monopoly on political debate by restricting independent citizens' advocacy. In contrast, Justice L'Heureux-Dubé upheld these restrictions on freedom of speech (a constitutional right) for the sake of a vague theory of "electoral fairness," which is not found anywhere in the Constitution.¹³

In *Gosselin v. Quebec (Procureur général)*,¹⁴ Justice Major upheld a Quebec welfare regulation that reduced benefits for able-bodied adults under thirty, who refused to enter job training, community work, or school. Justice L'Heureux-Dubé would have prevented the government from encouraging people to get off welfare, and went so far as to assert a constitutional right to collect welfare as part of the *Charter* right to "security of the person."¹⁵

In *Trinity Western University v. College of Teachers (British Columbia)*,¹⁶ Justice L'Heureux-Dubé discredited a private Christian university's education program merely because the school's code of conduct condemned homosexual behaviour.¹⁷ Her narrow interpretation of religious freedom was made in the absence of any evidence that Trinity Western graduates, as teachers, had ever mistreated or disrespected students in schools. Justice Major adopted a more generous and liberal interpretation of religious freedom.

Competing Perspectives on Freedom and Equality

Judging the Judges shows that some justices tend towards a classical liberal conception of freedom and equality, while others tend to reject these ideas.

The classical liberal perspective on freedom and equality posits that people are first and foremost individual members of the human family, and that all individuals possess the same needs, wants, feelings, hopes, fears, and human nature. An individual's race or ethnicity, religion, creed, gender, and membership in other such identity groups is relevant, but secondary to a person's

primary identity as an individual. Therefore, from the classical liberal perspective, a person should be equal before the law *as an individual*, regardless of race or ethnicity, gender, religion, or membership in any other group. Further, if equality before the law "for individuals, as individuals" results in some groups in society doing better than other groups (*i.e.*, earning more money or achieving more success in certain professions), a classical liberal would say "so be it; that's where the chips fall, it is not the function of government, through law, to create substantive equality for various social, gender, or ethnic groups (*eg.*, women; Aboriginals)." Further, government's efforts to do this will inflict injustice because individuals will no longer be judged on the basis of merit, talent, and character. If government ceases to be an impartial referee by trying to help "disadvantaged" groups, the result will be resentment and social strife.

The classical liberal also posits that the individual should be free from government coercion and restraint. Government should be limited to core functions such as national defence, policing, the impartial administration of justice in criminal and civil courts, and other tasks that cannot be carried out effectively (or at all) by individuals acting alone or in association with others.

In the context of public interest litigation, the opposite of classical liberalism could be described as socialism, postmodernism, group identity politics, or perhaps simply "the left." This ideology emphasizes the individual's membership in one or more groups according to race or ethnicity, gender, religion, age, language, or other factors as being more important than the individual's common humanity. In this socialist or post-modernist vision, equality does not mean equality before the law for individuals *as individuals*, but rather *substantive equality* in society and in the economy *for groups* formed on the basis of gender, race, or other criteria. In designing and applying the law, government should be both the referee enforcing the rules, as well as a powerful player helping out whichever group is deemed "disadvantaged." Laws should be different, or should be applied differently for different people, depending on their race

or gender, or other factors, to create substantive equality for society's various groups. This vision of equality necessarily lends itself to support for larger, more active, and more powerful government, performing tasks well beyond the core functions to which classical liberals would limit government.

The *Charter* incorporates classical liberal values in the fundamental freedoms set out in section 2: the individual's freedom of religion, conscience, expression, peaceful assembly, and association. By contrast, sections 35 (Aboriginal and treaty rights) and 15 (equality rights, which courts have interpreted to mean substantive equality), are based on a vision that is radically different from classical liberalism. Courts have asserted that there is no conflict between rights, and no hierarchy of rights. But if this were true, why is there so much litigation in which religious freedom, asserted under section 2, clashes with homosexual rights asserted under Section 15?¹⁸

Funding Only One Perspective: The Court Challenges Program

During the 1980s and 1990s, the Court Challenges Program (CCP) gave millions of tax dollars to LEAF, EGALE, and other groups which advocate a perspective different from, and usually hostile to, the classical liberal perspective. For example, recipients of CCP funding have advocated:

- people being entitled to collect welfare regardless of income earned by a common law spouse residing in the same house (*Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community and Social Services)*);¹⁹
- non-citizens acquiring the opportunity to avoid deportation by giving birth to children in Canada (*Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)*);²⁰
- pregnant women having a right to continue harming their unborn children by sniffing glue (*Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*);²¹
- spending more tax dollars on legal aid (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*);²² on treating autism (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*);²³ and on health services for non-citizens (*Irshad (Litigation Guardian of) v. Ontario (Ministry of Health)*);²⁴
- lowering physical fitness standards for fire-fighters to accommodate women (*British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*);²⁵
- restricting freedom of political speech in the name of "equality" and "Canadian values" (*Reference Re Kane*);²⁶
- extending Employment Insurance benefits to people having worked less than 700 hours in the preceding one-year qualifying period (*Canada (Attorney General) v. Lesiuk*);²⁷
- government prohibition of prayer and peaceful protest near abortion clinics (*R. v. Demers*);²⁸
- the view that legally owned guns play a significant role in perpetrating violence against women and children (*Reference Re: Firearms Act (Canada)*);²⁹
- reference to "spouse" referring to a member of the same sex (*M. v. H.*);³⁰
- prisoners convicted of serious crimes having the right to vote (*Sauvé v. Canada (Chief Electoral Officer)*);³¹
- receipt of welfare payments as a constitutional right (*Gosselin*);³²
- *Canada Elections Act* restrictions on independent citizens' advocacy as constitutionally valid limits on freedom of expression and freedom of association (*Harper*);³³
- criminalizing parental spanking of children (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*);³⁴

- reduced sentences for conviction for importation of large quantities of cocaine into Canada if the accused are black, single mothers (*R. v. Hamilton* and *R. v. Spencer*);³⁵
- adding sexual orientation to human rights legislation as akin to race, gender, and religion (*Vriend v. Alberta*);³⁶
- an automatic right to appeal deportation hearings for foreign nationals with a criminal record, deemed to be a danger to the public (*Solis v. Canada (Minister of Citizenship and Immigration)*);³⁷
- redefinition of marriage to include same-sex couples (*Egan v. Canada*).³⁸

The advocacy of these positions has been paid for by all Canadians — including those who disagree with this advocacy — through their tax dollars. The CCP funded only those groups which agreed with its conception of freedom and equality, while refusing to fund those who disagreed with the CCP’s ideology.

The notion that recipients of CCP funding deserve taxpayer support because they suffer “systemic barriers” not encountered by non-recipients is flawed in three respects.

First, litigation is unaffordable for all but a very small fraction of Canadians. In other words, 99 percent of Canadians, regardless of their ideological perspective, are equally disadvantaged in being unable to afford constitutional litigation on their own. When it comes to paying for litigation out of one’s own pocket, a person earning \$100,000 per year is as incapable of doing so as a person earning \$8,000 per year. Almost all Canadians, regardless of their opinions, philosophy, or level of income, are required to pool resources or to seek other forms of assistance in asserting their constitutional rights.

Second, the assumption that ideological perspectives consistently and reliably correlate with wealth has no empirical basis. In respect of the positions listed above that were advocated by CCP recipients, it is naïve to assume that all supporters of these positions are poor,

and that all of the opponents of these positions are wealthy. On a case-by-case basis, supporters and detractors of the policy positions set out above vary widely across income brackets.

Third, even if wealthy Canadians were uniformly opposed to the opinions of LEAF, EGALE, and other CCP favourites, constitutional litigation need not depend on a handful of large donations from wealthy individuals. Litigation can be financed through numerous smaller donations, and in fact this has been done by Canadians whose views do not conform to the CCP’s perspective on freedom and equality.

Clients of the Canadian Constitution Foundation, for example, whose stories are described in detail below, are not Canadians of means. James Robinson is a carpenter, Lindsay McCreith a retired body shop owner, Shona Holmes a family mediator, Richard Nomura a fisherman, and Doug Gould runs a small business. None of these individuals could have paid, or would be able to pay, for constitutional litigation out of his or her own pocket.

The Success of CCP-funded Litigants

In *The Charter Revolution and the Court Party*,³⁹ University of Calgary professors F.L. (Ted) Morton & Rainer Knopff argue that *Charter* litigation which influences public policy has been dominated by taxpayer-funded left-wing groups like LEAF. Ian Brodie, a professor at the University of Western Ontario, notes that the most frequent interveners in *Charter* cases were recipients of tax dollars through the Secretary of State, the Court Challenges Program, or both.⁴⁰

The dominance of the left in *Charter* litigation was confirmed more recently by Toronto lawyer Avril Allen, in her study “An Analysis of Interest Group Litigation in Canada.”⁴¹ Ms. Allen categorizes interest groups as belonging to the social left (LEAF and EGALE), the economic left (Charter Committee on Poverty Issues), the social right (REAL Women and Focus on the Family) and the economic right (Canadian Taxpayers Federation and National Citizens

Coalition). Ms. Allen's review of 109 reported cases shows that the social left enjoyed a success rate of 67 percent, "success" here defined as having supported, or intervened in support of, the winning litigant. The economic left was much less successful, supporting the winning litigant 33 percent of the time. The economic right was successful 50 percent of the time. The social right enjoyed success only 22 percent of the time.

When relevant litigation is categorized as "offensive" (challenging legislation which is undesirable from the group's perspective) or "defensive" (supporting legislation which the group views as desirable), a similar pattern emerges. The social left enjoyed twenty-two policy gains through success in offensive litigation, and suffered only three policy losses in defensive litigation. The economic left enjoyed four policy gains through offensive litigation, but suffered two losses in defensive litigation. The economic right enjoyed four policy gains in offensive litigation, and did not suffer any defensive losses. The social right's success rate was abysmal, with ten policy losses in defensive litigation, and not a single policy gain in offensive litigation.

Although correlation is not the same as causation, it stands to reason that more money provides a group with greater capacity to engage in more advocacy. More staff can be hired for legal research and involvement in more court cases as a sponsor or intervener, and larger and more effective networks of like-minded lawyers, law professors, and other academics can be developed.

Whether true or not, the thesis that more funding leads to more courtroom success has many adherents among CCP supporters and detractors. Both supporters and detractors point to the courtroom success of LEAF and EGALE as the reason why CCP funding should (or should not) be restored.

At Last: A Level Playing Field

In a constitutional democracy, individuals and organizations have every right to use the courts to press for public-policy change. How-

ever, requiring people to pay for advocacy with which they disagree is fundamentally unfair. By way of illustration, one might ask how LEAF supporters would feel if their tax dollars were used to support court challenges to advance the right to life of unborn children? Or how members of the Canadian Labour Congress — a recipient of tax dollars through the CCP — would feel if their tax dollars paid for court advocacy against compulsory union membership? How would EGALE supporters feel about their tax dollars supporting litigation defending the traditional definition of marriage? These are questions which CCP supporters should ask themselves when they advocate for the program's return.

Equality demands that governments refrain from spending tax dollars to favour one side of a controversial issue, especially when there are *several* sides which should be heard, and not merely two.

There are Canadians in all income brackets who agree with the CCP's ideology, and Canadians in all income brackets who oppose it. The abolition of the CCP has created a level playing field for public interest litigants holding a wide variety of views. Canadians who oppose the agenda of LEAF, EGALE, and other CCP favourites, are no longer at a disadvantage since all groups now have an equal responsibility to raise funds from those who agree with their philosophies.

Holding Governments Accountable to the Constitution

The Canadian Constitution Foundation defends and promotes the constitutional freedoms of Canadians through education and public interest litigation. Since 2005, the foundation has centered its education and litigation efforts on individual freedom, economic liberty, and equality before the law. The foundation's clients are Canadians of modest means who, like their fellow countrymen, are unable to pay for asserting their constitutional rights in court.

The foundation's first client, Sga'Nisim Sim'Augit or James Robinson, holder of the he-

editary title of Chief Mountain of the Nisga'a people in northwestern British Columbia (B.C.), applied for funding from the Court Challenges Program to pursue his equality rights, but was denied. Nevertheless, he has succeeded in launching a constitutional challenge to the Nisga'a agreement on self-government on the basis that it violates Canada's Constitution and his equality rights. Chief Mountain opposes the Nisga'a Final Agreement because it creates an ethnically-based "third order" of government in which only Nisga'a citizens have the right to vote. This new layer of Aboriginal government has the power to pass laws which contradict — and prevail over — federal and provincial laws.

Before the Nisga'a Final Agreement⁴² came into force in 2000, retired Supreme Court of Canada Justice Willard Estey testified before the Standing Senate Standing Committee on Aboriginal Peoples that the Nisga'a Final Agreement violates Canada's constitution.⁴³ Retired Supreme Court of Canada Justice William McIntyre and retired B.C. Court of Appeal Justice Michael Goldie concurred with Justice Estey's written brief, which states that sections 91 and 92 of the *Constitution Act, 1867*⁴⁴ exhaustively allocate all legislative power to Canada's federal and provincial governments, leaving no room for a "third order" or "third level" of Aboriginal government that is unaccountable to Canada's federal and provincial governments. Alex Macdonald, former B.C. NDP attorney general, also testified before the Senate Committee that the Nisga'a Final Agreement creates a semi-independent country in northwestern British Columbia.

Without any help from the Court Challenges Program, Chief Mountain has fought the defendant governments' delay tactics for more than eight years. He continues to push his challenge towards trial, something that the federal, provincial, and Nisga'a governments seem keen to avoid.

No Taxation without Representation

In 2006 the Canadian Constitution Foundation took on its second court challenge, ap-

plying for intervener status before the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*,⁴⁵ a constitutional case concerning illegal taxation. The case arose when pub owners challenged the constitutionality of New Brunswick's 11 percent user charge on alcoholic beverages, which was imposed in addition to provincial liquor tax, provincial sales tax, and the goods and services tax. The trial judge held that the 11 percent user charge was an indirect tax and therefore *ultra vires* provincial jurisdiction. On appeal, the only issue was whether governments are required to return illegally collected tax revenues to the taxpayers.

The governments of British Columbia, Alberta, and Manitoba intervened in support of New Brunswick's argument that governments should be entitled to keep the tax revenue to avoid "fiscal chaos" and "financial shock." In a unanimous decision rendered in January 2007, the Supreme Court of Canada adopted the arguments put forward by the Canadian Constitution Foundation, including the argument that "no taxation without representation" is a constitutional principle to which governments must adhere. The Court ordered the New Brunswick government to repay the money to the pub owners.

Access to a Waiting List is Not Access to Health Care

The foundation's third court case was launched in 2007, and concerns access to health care. Lindsay McCreith and Shona Holmes are suing the Ontario government for access to essential health care services, which became a constitutional rights matter with the 2005 Supreme Court of Canada decision *Chaoulli v. Quebec (Procureur Général)*.⁴⁶ "Access to a waiting list is not access to health care," stated Chief Justice Beverley McLachlin in *Chaoulli*, and the Court struck down Quebec's ban on private health insurance.⁴⁷

The Supreme Court was evenly split on the question of whether a ban on private health insurance violates the *Charter's* section 7 right to life, liberty, and security of the person. How-

ever, the majority was unequivocal in stating that a total ban on private health care is not required to maintain a sound public health care system. The experience of other countries — all of which allow various forms of private health care, with some having virtually no waiting lists — was referred to by the Court in *Chaoulli*.

Lindsay McCreith, a retired body shop owner from Newmarket, Ontario, suffered a seizure in January 2006, but was told he would have to wait more than four months for an MRI to determine whether or not the tumor in his brain was cancerous. Even after paying for an MRI in Buffalo, New York, which showed that the tumor needed to be removed, Mr. McCreith was still told to wait for months to see a specialist, followed by another wait for surgery. Mr. McCreith paid out-of-pocket for surgery in Buffalo to remove the tumor, which was indeed cancerous. Had he waited eight months for diagnosis and treatment in Ontario, he might be dead today.

Shona Holmes of Waterdown, Ontario, was told in 2005 that she would lose her vision if surgeons did not immediately remove a growing brain tumor. The tumor had already caused her to lose half of her vision in one eye, and one quarter in the other eye. Ontario's government-monopoly health care system would only promise Ms. Holmes a spot on a waiting list. Unwilling to risk permanent blindness, she obtained treatment at the Mayo Clinic in Arizona. Within ten days of the surgery, her vision was completely restored.

Rejecting Racial Segregation of the Workplace

In its fourth court intervention, the foundation represented the Japanese Canadian Fishermen's Association when it intervened before the Supreme Court of Canada in *R. v. Kapp*,⁴⁸ a constitutional challenge to a race-based commercial fishery, operated exclusively for the benefit of individuals with bloodline ties to the Musqueam and Tsawwassen Indian Bands. This separate commercial fishery for some Aboriginals was created by the federal government, in spite of the fact that Aboriginals have always

done very well in B.C.'s commercial fishery, and have never faced barriers or discrimination in that industry. In fact, between one third and one half of B.C.'s fishermen, license holders, and vessel owners are Aboriginal.

For Richard Nomura and other fishermen of Japanese ancestry, this race-based commercial fishery is especially painful, as their ancestors were subjected to anti-Oriental fisheries policies during the 1920s, when approximately one half of Japanese Canadian fishermen were forced out of the industry.

In the 1920s, a predecessor of the Japanese Canadian Fishermens Association successfully challenged the federal government's race-based policies in B.C.'s commercial fishery. In 1928, in *Reference Re Certain Sections of the Fisheries Act, 1914*,⁴⁹ the Supreme Court of Canada ruled that "any British subject residing in the province of British Columbia, who is not otherwise legally disqualified, has the right . . . to receive a license." Richard Nomura hopes that the Supreme Court will use *R. v. Kapp* to affirm its 1928 decision in support of racial equality.

Doug Gould's constitutional challenge to a race-based business licensing scheme imposed by Parks Canada was the foundation's fifth court challenge. Doug Gould was born and raised on the Queen Charlotte Islands, where he lives with his wife and their children. Doug Gould runs a tourism business taking visitors through the Gwaii Haanas National Park. Parks Canada requires applicants for business licenses to identify themselves as Haida Indian or as non-Haida. Parks Canada has imposed a limit of 22,000 user days on tour operators for conservation purposes, of which 11,000 are available only to the Haida. Non-Haida Canadians are limited to the other 11,000, and cannot expand their businesses, even if the quota for Haidas is not expended, as is now the case.

Mr. Gould objected to the government asking people to identify themselves by ancestry, ethnicity, race, or bloodline tie, and then using the answer as a criterion in the issuing of business licenses. Doug believes that each Canadian citizen — Aboriginal or otherwise — must be treated as a member of the same human fam-

ily. People should be free from government-imposed discrimination by reason of immutable personal considerations such as ethnicity and gender. In *Moresby Explorers Ltd. and Douglas Gould v. Attorney General of Canada*, the Federal Court of Appeal upheld this Parks Canada policy as not in violation of the Constitution. The case has profound implications across Canada because many trades, occupations, and livelihoods depend on government licenses.⁵⁰ In February 2008, the Supreme Court of Canada denied leave to appeal.

Conclusion: Equal Opportunity for All Litigants

The Canadian Constitution Foundation believes that our Constitution belongs to *all* Canadians, including James Robinson, Shona Holmes, Lindsay McCreith, Richard Nomura, Doug Gould, and New Brunswick pub owners. Although it is not easy for Canadians to assert their constitutional rights, it is possible for all Canadians to do so if they enlist the support of those who share a similar vision of freedom and equality.

Notes

- * BA, LL.B, Executive Director, Canadian Constitution Foundation.
- 1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].
 - 2 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
 - 3 60 U.S. (How.) 393 (1856) [*Dred Scott*].
 - 4 *Ibid.* at 407.
 - 5 *An Act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories*, c. 22, 3 Stat. 545 (1820).
 - 6 John E. Kramer, "IJ's Merry Band of Litigators," online: Institute for Justice <http://www.ij.org/merry_band/index.html>.
 - 7 536 U.S. 639 (2002).
 - 8 Chris Schafer, *Judging the Judges: The Supreme Court of Canada's Record on Individual and Economic Freedom and Equality* (Canadian Constitutional Foundation, 2007), online: <[canadianconstitutionfoundation.ca/files/pdf/Judging-the-Judges-10-April-2007.pdf> \[*Judging the Judges*\].](http://www.</div><div data-bbox=)

- 9 *Ibid.* at 7, 25-26, 31.
- 10 *Ibid.* at 7, 25-27.
- 11 [2000] 2 S.C.R. 764 (CanLII) [*Harper*].
- 12 S.C. 2000, c. 9.
- 13 *Supra* note 11 at para. 10
- 14 [2002] 4 S.C.R. 429 (CanLII) [*Gosselin*].
- 15 *Ibid.* at paras. 98-149.
- 16 [2001] 1 S.C.R. 772 [*Trinity Western*].
- 17 *Ibid.* at paras. 67-111.
- 18 See for example, *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (CanLII); *Smith Chymyshyn v. Knights of Columbus* (2005), BCHRT 544; *Kempling v. College of Teachers (British Columbia)* (2005), 43 B.C.L.R. (4th) 41 (CanLII); *Hall (Litigation Guardian of) v. Powers* (2002), 213 D.L.R. (4th) 308 (CanLII); *Trinity Western supra* note 16; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (CanLII).
- 19 (2000), 188 D.L.R. (4th) 52 (CanLII).
- 20 (1998), 160 D.L.R. (4th) 557 (CanLII).
- 21 (1997), 152 D.L.R. (4th) 193.
- 22 (1997), 145 D.L.R. (4th) 349.
- 23 [2004] 3 S.C.R. 657 (CanLII).
- 24 (2001), 197 D.L.R. (4th) 103 (CanLII).
- 25 [1999] 3 S.C.R. 3 (CanLII).
- 26 [2001] 9 W.W.R. 744.
- 27 (2003), 299 N.R. 307 (CanLII).
- 28 (2003) B.C.C.A. 28 (CanLII).
- 29 [2000] 1 S.C.R. 783 (CanLII).
- 30 [1999] 2 S.C.R. 3 (CanLII).
- 31 [2002] 3 S.C.R. 519 (CanLII).
- 32 *Supra* note 14.
- 33 *Supra* note 11.
- 34 [2004] 1 S.C.R. 76 (CanLII).
- 35 *R. v. Hamilton* (2004), 241 D.L.R. (4th) 490; *R. v. Spencer* [2003] O.J. No. 1052.
- 36 [1998] 1 S.C.R. 493.
- 37 [1998] F.C.J. No. 675.
- 38 [1995] 2 S.C.R. 513 (CanLII).
- 39 F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000).
- 40 Ian Brodie, *Interest Groups and the Supreme Court of Canada* (Ph.D. thesis, University of Calgary, 1997) [unpublished]; Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).
- 41 Avril Allen, "An Analysis of Interest Group Litigation in Canada" (Presented to the Future of Freedom conference, Toronto, Ontario, 13 October 2007), online: <[Constitutional Forum constitutionnel](http://www.canadian-</div><div data-bbox=)

- constitutionfoundation.ca>.
- 42 Agreement among the Nisga'a Nation, Her Majesty the Queen in right of Canada, and Her Majesty the Queen in right of British Columbia (1999), online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html>.
- 43 Canada, Parliament, Standing Senate Committee on Aboriginal Peoples, "Proceedings of the Standing Senate Committee on Aboriginal Peoples, Issue 7: Evidence" (23 March 2000), online: <http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/07ev-e.htm?Language=E&Parl=36&Ses=2&comm_id=1>; see also <www.CanadianConstitutionFoundation.ca>.
- 44 *Supra* note 2.
- 45 [2007] 1 S.C.R. 3 (CanLII).
- 46 [2005] 1 S.C.R. 791 (CanLII) [*Chaoulli*].
- 47 *Ibid.* para 123.
- 48 (2006) B.C.C.A. 277 (CanLII).
- 49 [1928] S.C.R. 457.
- 50 (2007), 284 D.L.R. (4th) 708 (F.C.A.), leave to appeal to S.C.C. refused (21 February 2008).