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## THE USE OF AMERICAN PRECEDENTS IN CANADIAN COURTS

Gérard V. La Forest\*

In 1849, the Supreme Court of New Brunswick faced the issue of whether there was a public right to float logs on navigable streams.<sup>1</sup> Not surprisingly, no general right was found in the English common law as large scale floating of lumber down rivers did not exist in England. "Yet in a young country like Canada, the right to float logs and timber was an economic necessity in many areas and some device had to be found to make the activity legal."<sup>2</sup> To find that legal device, the New Brunswick court turned to the United States, specifically to Maine, and adopted the principle of floatability from *Wadsworth v. Smith*.<sup>3</sup> At a time when there was both necessity and shared circumstances, Canadian courts referred to Maine's experience for guidance.

One hundred and thirty five years later, in 1984, the New Brunswick Court of Queen's Bench faced the question of who had ownership of land that was restored after a dam on a river was removed.<sup>4</sup> Again, experience in Maine was helpful. *Bradley v. Rice*<sup>5</sup> indicated that the ownership rule applicable to normal rivers and streams also applied to artificial ponds created by expanding a stream by means of a dam, and the rule was applied in New Brunswick.

One would think such examples of regional borrowing would have occurred frequently. This is particularly so because most of English Canada began with the influx of the Loyalists who were on the losing side of the American Revolution. United States statutes were freely adopted in the new colonies, and many of the early lawyers and judges had American training.<sup>6</sup> Nonetheless, this sort of regional interchange seemed to fall to the forces, however artificial in the largest sense, that direct our legal attention along national rather than regional lines. Thus, for further evidence of transborder inter-

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\* Justice of the Supreme Court of Canada. This paper is adapted from a speech given at the annual meeting of the Maine State Bar Association, held at St. Andrews, New Brunswick, July 17, 1993.

1. *Rowe v. Titus*, 6 N.B.R. 326, 332-33 (1849).
2. G.V. LA FOREST AND ASSOCIATES, *WATER LAW IN CANADA—THE ATLANTIC PROVINCES* 191 (1993).
3. 11 Me. 278 (1834).
4. *See Brophy v. Alexander Constr. Co., Ltd. and Village of Blackville*, [1984] 55 N.B.R. 233, 238-39.
5. 13 Me. 198 (1836).
6. For example, New Brunswick's first Chief Justice, George Ludlow, had been a judge in New York. *See* A.G. Warwick Gilbert, *New Brunswick's First Chief Justice*, 11 UNB. L.J. 29 (1958). *See also* Patricia A. Ryder, *Ward Chipman Sr.: An Early New Brunswick Judge*, 12 UNB. L.J. 65 (1959).

action, we must turn to the national stage, the subject of this paper.

## TRADITIONAL USE OF FOREIGN AND AMERICAN MATERIAL

### A. *The Traditional Use of Foreign Material*

Canadian courts have never been averse to the use of foreign materials. The expansive use of foreign precedents by Canadian courts has deep roots in Canada's formal and informal connections to the traditions of Britain and of France, and the two great European private law traditions of common law and civil law. The civil law tradition, however, was largely confined to Quebec. Legislatively, even after the end of colonial status, many statutes were based on English counterparts, so recourse to English precedents for interpretation was understandable. What ensured the continued influence of British material was the continued direct links to the English system even after the union of the British North American colonies at Confederation in 1867. Established in 1875, the Judicial Committee of the Privy Council in Britain, rather than the Supreme Court of Canada, remained the final court of appeal for Canada until 1949.

Well before the end of the formal link to the Judicial Committee, courts had begun to place greater reliance on the now more extensively developed Canadian sources. But the historical link to English traditions had generated a continued willingness to use English precedents. It was, in part, a function of familiarity, aided and abetted by the relatively undeveloped state of Canadian law schools, which, like the practitioners, relied heavily on English precedents and textbooks. These influences were also strengthened by the fact that a significant number of the leading lawyers were trained abroad. In light of this environment, it is not surprising that foreign material worked its way into the courts in Canada. It was a function of necessity flowing from the fact that Canada was then a small society with a relatively short legal tradition.

This background affords only a partial explanation for our modern and expanding reliance on foreign materials. I like to think this recent phenomenon is a reflection of a Canadian perspective. Canada is now a larger, more influential society, with its own fairly lengthy legal tradition. Necessity has been replaced by a sincere outward-looking interest in the views of other societies, especially those with traditions similar to ours. Our increasing resort to American materials is only a part of this more cosmopolitan approach to law.

### B. *The Use of American Materials*

The fact that American materials were occasionally used from the beginning of Canada's jurisprudence is a product of a number of forces. Both countries share a common law heritage in private law and in liberal democratic and federal structures of government. Second, there were commercial and other forces peculiar to the North

American legal and societal development. Third, and increasingly since World War II, many of our legal scholars took their training at the great law schools in the United States, and legal education in Canada has since largely adopted the American model. There is a definite link between the use of these foreign materials and the foreign training of the judge or lawyer. In an article surveying the use of American jurisprudence in the Supreme Court of Canada, it was found that the six judges with American educational training were leaders in the use and citation of American precedents.<sup>7</sup> For example, the great Supreme Court Justice, Ivan C. Rand, who earned his LL.B. from Harvard, was the leading user of American materials in the Court of the 1950s.<sup>8</sup> My own willingness to use American materials was certainly enhanced by my time spent as a graduate fellow at Yale. Nonetheless, it remained true that until recent years the use of American materials was infrequent, sometimes shallow, and definitely overshadowed by the use of English and, in Quebec, French precedents.

Still the use of American material gradually expanded. The United States was often the only or first jurisdiction to deal with many new areas of law. A particularly Canadian institution, the Law Reform Commissions, in carrying out their mandates became quite familiar with American reform initiatives ranging from evidence codes and the uniform commercial codes to the Model Criminal Code and codes of procedure and often improved on these as they went along. All these developments set the stage, making the Canadian courts ripe for the expanded use of American materials. But it really was one event, the enactment in April 1982 of the Canadian Charter of Rights and Freedoms (*Charter*),<sup>9</sup> our version of a constitutional Bill of Rights, that marked the decisive point in this transition to an expanded use of American materials.

#### THE INFLUENCE ON CHARTER INTERPRETATION

In public law especially, the Canadian experience was already very distinct from the English experience. The *Charter* made it even more so. The leading repository of civil rights jurisprudence was clearly the American experience with the Bill of Rights. In its very first *Charter* case, our Supreme Court noted that American experience in constitutional interpretation was of more than passing interest.<sup>10</sup> Counsel were not slow to respond. They raised a vast panoply of issues, citing in support of their positions a plethora of American precedents as we passed through an experience that I described five

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7. S.I. Bushnell, *The Use of American Cases*, 35 U.N.B. L.J. 157, 169 (1986).

8. *Id.*

9. CAN. CONST. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms).

10. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 367.

years ago:

It is a rather strange sensation to sit on the Court at this time. It is like compressing the United States' experience of about 50 years into a moment of time. There was no building up gradually as occurred in the United States, beginning with a relatively blank slate. There is the good news that we can turn to American experience, but the bad news is that we have to learn it as we go along. It is voluminous and it has to be sieved through different verbal formulations and community experience. In other words, we have to learn it from scratch, and then try to apply it intelligently to our somewhat different situation.<sup>11</sup>

In some areas, American precedents proved to be of immediate and direct assistance. For example, in assessing the constitutionality of indeterminate sentences for dangerous offenders, I was very much influenced by the American material.<sup>12</sup> It was immediately apparent, however, that American principles would always have to be adjusted to suit the different Canadian context and that transposition required great caution.<sup>13</sup> Speaking of the equivalent of the American right to speedy trial, for example, I made it clear in *R. v. Rahey*,<sup>14</sup> that American jurisprudence, while helpful, could not be slavishly followed. In somewhat strident terms, I stated:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances, particularly given the substantive implications of both s. 1 and s. 24(1) of the *Charter*. Canadian legal thought has at many points in the past deferred to that of the British; the *Charter* will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.<sup>15</sup>

The majority did not heed my warning in that particular case, but did not disagree with the sentiment.

In particular, many commentators have observed that the *Charter* reflected our greater communitarian, less individualistic traditions.<sup>16</sup>

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11. Gérard V. La Forest, *The Use of International and Foreign Material in the Supreme Court of Canada*, PROCEEDINGS OF THE 1988 CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 230, 238 (1988).

12. *R. v. Lyons*, [1987] 2 S.C.R. 309, 315-16.

13. *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145, 161.

14. [1987] 1 S.C.R. 588.

15. *Id.* at 639.

16. See, e.g., Will Kymlicka, "Liberalism, Individualism, and Minority Rights" in A.C. Hutchinson and L.J.M. Green, eds., *Law and the Community: The End of Individualism?* 181 (1990); J.E. Magnet, "Multiculturalism and Collective Rights: Ap-

Indeed, this aspect of Canadian society could be seen in the very drafting of the *Charter*. In particular, it included sections specifically affirming multiculturalism, the rights of women, linguistic minorities, and aboriginal peoples. There was also the broader scope of our equality rights under Section 15. And finally, and perhaps most importantly, is the express balancing device of the general justification provision in Section 1, which guarantees the *Charter* rights, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>17</sup>

Differences between Canadian and American legal traditions have been readily apparent, for example, in the area of freedom of expression. Of course, there are many similarities because both our societies place a high premium on that right. Thus, we have followed American precedents in defining the purposes of our right to freedom of expression protected by Section 2(b) of our *Charter*. In fact, we have gone beyond the American cases in defining the scope of protected speech. In particular, our courts have emphasized that Section 2(b) is content neutral. The only restriction so far in Section 2(b) has been for violent speech or threats of violence.<sup>18</sup>

In applying Section 1 of the *Charter*, Canadian courts have permitted scope for government restrictions on free speech for the protection of various vulnerable groups and individuals in society. The American "strict scrutiny" standard has not been followed. In the central case, *R. v. Keegstra*,<sup>19</sup> the majority departed from American First Amendment jurisprudence on the basis of differing national traditions, and upheld the hate propaganda laws in the *Criminal Code*. The accused there had been charged with wilful promotion of hatred. He had been teaching children in a rural Alberta school that the Holocaust never occurred and that there existed a worldwide Jewish conspiracy. In support of its position, our Court relied heavily on international conventions, a recurring theme with Canadian court, that took the same view of the matter. In *R. v. Butler*,<sup>20</sup> the Court unanimously upheld obscenity laws aimed, as the Court interpreted them, at depictions of sexual violence against women, or sexual acts with children, on the basis of evidence that such depictions are harmful to women and children. The Court substituted a "harm" approach for a "community standard" approach.<sup>21</sup>

The Canadian courts have developed considerable sophistication

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proaches to Section 27" in G.A. Beaudoin and E. Ratushny, eds. *The Canadian Charter of Rights and Freedoms*, 739 (2nd ed. 1989); Michael Hartney, "Some Confusions Concerning Collective Rights" IV:2 *Can. J. of Law and Jurisprudence* 293 (1991).

17. PETER W. HOGG, *Constitutional Law of Canada* 678-79 (1985).

18. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

19. [1990] 3 S.C.R. 697.

20. [1992] 1 S.C.R. 452.

21. *Id.* at 476-81.

in their understanding of American law. At times they follow one strand of American thinking, rather than the one adopted by American courts. One example is *R. v. Duarte*,<sup>22</sup> a case dealing with the state's use of warrantless electronic surveillance techniques when a participant has given his or her consent to such use. In my judgment for the *Duarte* Court, I refused to follow the more conservative views of the United States Supreme Court.<sup>23</sup> I preferred the position taken by Justice Harlan, in dissent, who feared the spillover effects of such unregulated surveillance, which "subjects each and every law-abiding member of society to that risk."<sup>24</sup> I also relied on the more liberal view of a number of state appellate courts in interpreting their state constitutions, noting that their "decisions make an eloquent case in support of the proposition that unregulated participant surveillance cannot be reconciled with the right to be secure against unreasonable search and seizure."<sup>25</sup>

The repeated use of American constitutional material, though undoubtedly the most extensive and rewarding, is simply an aspect of a more general trend. In dealing with cases involving human rights, we make frequent references to international instruments and their application both by international bodies and domestic courts in various countries.<sup>26</sup> This is, in part, a reflection not only of the fact that the *Charter* and other human rights instruments were adopted against the background of the post-war international recognition of human rights throughout the globe but is also grounded in a belief in the value of comparative analysis. Thus, we frequently cite European sources with regard to both human rights and economic integration.<sup>27</sup>

#### EXPANDED USE IN OTHER AREAS

The use of American and foreign material has spread into other areas of Canadian law, whether public, commercial, or private. In a number of fields this trend preceded the *Charter*, but the growing familiarity with American sources has spurred this development. One area is labor law. In the recent case of *Dayco (Canada) Ltd. v. CAW—Canada*,<sup>28</sup> for example, the Court was called upon to discuss the survivability of retiree benefits under a collective agreement. Despite the different remedial structures in the two countries, we accepted the American conclusion that such rights can be vested in

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22. [1990] 1 S.C.R. 30.

23. See *United States v. White*, 401 U.S. 745 (1971).

24. *Id.* at 789; see *R. v. Duarte*, [1990] 1 S.C.R. at 54.

25. *R. v. Duarte*, [1990] 1 S.C.R. at 49.

26. See *La Forest*, *supra* note 11.

27. See, e.g., *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

28. [1993] 2 S.C.R. 230.

the individual retirees. Reliance on American law is most valuable, as in this instance, where American courts have wrestled with a problem before we have. This has frequently happened in the field of insurance where a significant part of the industry is organized on North American lines.<sup>29</sup> We have in recent years been consulting American and foreign experience in areas of law as diverse as sterilization,<sup>30</sup> executive immunity,<sup>31</sup> sovereign immunity,<sup>32</sup> extradition,<sup>33</sup> conflicts of laws,<sup>34</sup> and lately, more ambitiously, tort and contract,<sup>35</sup> fiduciary relationships,<sup>36</sup> and constructive trusts.<sup>37</sup> This effort is a significant attempt to rationalize and integrate the law of civil liability and its various remedies. In several cases, our Court reviewed the relevant law not only of the United States, Great Britain, and the Commonwealth countries, but also the civil law experience in Quebec, France, and Germany.

Recent practice indicates that American and foreign materials are being used in different areas in a more sophisticated way than ever before in Canada. It may be that recourse to American materials will become less necessary in the *Charter* context as we develop a more extensive and distinctive domestic jurisprudence in the area, but I am confident that the use of American, international, and foreign materials will continue to grow in other areas.

More and more American law is being cited by counsel. No doubt this is partly due to the fact that an increasing number of our young lawyers receive training in the United States and abroad. Transnational influences such as growing international trade, international crime, and international firms play a part in the increasing use of such sources. So too do international information systems that allow quick searches of storehouses of legal material. More importantly, the Court's use of these materials feeds their further use.

Why do Canadians use foreign materials? What benefit do we seek? Certainly it is no longer merely a habit of dependence. Rather, as I said, it is because we are genuinely interested in the comparative approach, in learning how other traditions have dealt with the problems with which we are wrestling. This sort of legal cosmopolitanism is a valuable source of enrichment and greater sophistication.

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29. *N.B. (Greece) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Kosmopoulos v. Constitution Ins. Co.*, [1987] 1 S.C.R. 2.

30. *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388.

31. *Carey v. Ontario*, [1986] 2 S.C.R. 637.

32. *Re Canada Labour Code*, [1992] 2 S.C.R. 50.

33. *Argentina v. Mellino*, [1987] 1 S.C.R. 536.

34. *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

35. *Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021.

36. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.

37. *London Drugs Ltd. v. Kuehne & Nagel Int'l Ltd.*, [1992] 3 S.C.R. 299; *Lac Minerals Ltd. v. Int'l Corona Resources, Ltd.*, [1989] 2 S.C.R. 574.



It must, however, be subjected to critical evaluation in terms of its relevance to the Canadian situation.

#### LESSONS FOR AMERICANS

What does the Canadian experience with American precedents indicate with respect to the possibility for American lawyers looking north? One recent article on the criminal law jurisprudence under our *Charter* concluded on the pessimistic note that, although Canadian courts were referring to United States precedents with increasing sophistication, American jurists have yet to show a similar interest in Canadian criminal jurisprudence.<sup>38</sup> Similarly, at a seminar with American judges on international human rights last year, I was amazed to find that American courts rarely make reference to international agreements on the subject, whereas one scholar has counted nearly 150 Canadian cases that made reference to international documents on human rights law from the enactment of the *Charter* in 1982 to 1990.<sup>39</sup>

I suppose this is normal enough for a great power; especially one with such a wealth and variety of material at home. Even apart from this, habit may prevent American lawyers and judges from seeing the opportunities that lie in comparative analysis. Yet perhaps the lesson we have learned can work both ways. I would hope so. Sometimes American courts may need to remind themselves that this may be a concomitant of, and a source of enrichment, in an interdependent world. In areas where there is little American jurisprudence, turning to some comparative concepts may not simply be an exercise in esoteric theory. As in trade, it is surprising where little pockets of particular expertise develop in foreign courts. Canada may not be a bad place to look because our traditions, while different enough to encourage different perspectives, share enough common concepts to ensure possible applicability.

Through happenstance, other jurisdictions may first have to face novel issues or particular viewpoints. To take a very high profile example, our Court is currently struggling with the constitutionality of a statute that criminalizes physician-assisted suicide,<sup>40</sup> which is something I believe American courts will soon face. The parties to the case presented material from many jurisdictions including the United States, which we read with the greatest interest. As we seem to be one of the first national courts to face this question dead on,

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38. Robert Harvie and Hamor Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter*, 24 OTTAWA L. REV. 39, 112 (1992).

39. WILLIAM SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER*, 12 and Appendix II (1991).

40. Since this paper was prepared, the Court has issued its decision; see *Rodriguez v. R.*, [1993] 3 S.C.R. 519 (finding the provision constitutional).

and because of the similarity of the constitutional protections relied on to challenge the statute criminalizing such assistance, I would think our treatment of this area may be of interest to an American court.

This may extend to other areas where Canadian courts have been wrestling first, or more intensively, with policy concerns that develop later or less squarely in the United States. In the area of civil liability, for example, I have mentioned that we are attempting to set up a principled assessment of recovery for various types of civil wrongs, based on a realistic assessment informed by modern economics and law analysis, and on a synthesis and comparison with the practice in a number of civil law jurisdictions. Far less restrictive than the approach recently followed in the United Kingdom, the Canadian approach could be examined as an alternative analysis of these issues. An added benefit for American users of such cases is that Canadian courts frequently make the connection of their decision to the American jurisprudence by citing the relevant American cases. Such references and links would be easy to determine given the existing electronic search services that have spread to include Canadian sources.

In this particular field, our work has received very favourable comments throughout the common law world, and even in Europe. I shall take the liberty of citing one. It is a comment by Professor John Fleming of the University of California (Berkeley) on a recent case on tortious recovery for pure economic loss. He said:

This case is undoubtedly of first class importance and destined to become the point of reference for other courts throughout the common law world. True, it did not speak with one voice, but the very juxtaposition of divergent views, so ably presented, amply makes up this failing. It also serves as a model in two other, very important, matters of style. One is the consulting of comparative legal material, not as a polite gesture to the civil law tradition of Quebec alone but in earnest search for lessons from the experience of others. The parochialism pervading particularly the British judicial scene stands rebuked by the cosmopolitan scholarship of the Canadian profession. . . . The second milestone is the exacting analysis in the terms of economic theory. . . . That it has now found an entry also in the Commonwealth gives hope for an era of more tighter-reasoned articulation of legal policy in general. Altogether an exciting experience.<sup>41</sup>

It may even happen that Canadian judgments can provide a con-

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41. John Fleming, *Economic Loss in Canada* (1993), *THE TORT LAW REVIEW* 68, 74. See also B.S. Markensenis, *Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views* (1993), 109 *LAW QUART. REV.* 5; Sir Robin Cooke, *The Condition of the Law of Tort*, *Frontiers of Liability Seminar for The Society of Public Teachers of Law*, All Souls College, Oxford (July 3, 1993) (unpublished manuscript, on file with author).

sidered attempt to deal with and synthesize conflicting American material in a particular area. Thus, in the recent decision of *Re Canada Labour Code (USA v. PSAC)*,<sup>42</sup> our Court had to determine whether the Canadian Labour Code applied to civilians working on an American military base leased by Newfoundland on a World War II lend-lease agreement. Because of the dearth of Canadian authority, I attempted to work my way through some fairly complex United States materials on sovereign immunity, and to rationalize and synthesize the basic American law in that area.

Finally, Canadian jurisprudence may also be of interest in established areas because of the acceptance of a different viewpoint. I refer to the obscenity case noted earlier, which has elicited some interest south of the border.<sup>43</sup> Again, our Court has in recent years reassessed the law of extradition both in terms of the *Charter* and its own basic structure and rationale so as to meet the escalating challenges posed by transnational crimes.<sup>44</sup> As well, I have already mentioned our recent forays into civil liability.

To conclude, the use of foreign material affords another source, another tool for the construction of better judgments. Recourse to such materials is, of course, not needed in every case, but from time to time a look outward may reveal refreshing perspectives. The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication. In this era of increasing global interdependence, and in particular of even closer American-Canadian relations, it seems normal that there should be increased sharing in and among our law and lawyers as well.

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42. [1992] 2 S.C.R. 50.

43. See Daniel O. Conkle, *Harm, Morality and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity*, 10 CONST. COMMENTARY 105 (1993). The same author wrote an earlier commentary on our Court's abortion decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30: *The Canadian Abortion Decision and Its Implications for American Constitutional Law and Theory*, 26 CONST. COMMENTARY 299 (1989).

44. See, e.g., *McVey v. United States*, [1992] 3 S.C.R. 475; *United States v. Cotroni*, [1989] 1 S.C.R. 1469; *Argentina v. Mellino*, [1987] 1 S.C.R. 536.