

Seizing the Sword and the Purse:  
Judicial Remedies and the Separation of Power in Canada

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Section 24 of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> allows courts “of competent jurisdiction” to provide remedies they consider “appropriate and just in the circumstances.” The open-ended wording leaves considerable scope for judicial creativity. As Justice McIntyre recognized, “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion” than the wording of s.24.<sup>2</sup> Yet even the broadest language does not give the judiciary license to operate above or against the Canadian constitution. For example, the Court acknowledges that a s.24 remedy cannot require a provincial government to exercise a federal power. Federalism, in other words, acts as a constitutional constraint on Charter remedies. The Court has similarly acknowledged that its s.24 remedies must “respect the relationships with and separation of functions among the legislature, the executive and the judiciary.”<sup>3</sup> This paper argues that the Court has not in fact respected the “separation of powers” constraint on its powers. Using its remedial power in *Eldridge v. British Columbia (Attorney General)*<sup>4</sup> and related cases, the Court has seized the legislative power of the purse and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, it has seized the ‘sword’ of executive power with respect to political management.

This judicial trespass onto legislative and executive ground is enabled by the common argument that the allegedly distinct legislative and executive powers have been so effectively “fused” in our parliamentary system that the only meaningful separation of powers is between this fused parliament and the independent judiciary. The “fusion” argument makes it easier to justify the expansion of judicial power as introducing healthy inter-branch checks and balances into a system that otherwise lacks them. Even the accepted separation – between courts and elected actors – is construed in only one direction; it is often used to thwart encroachments on judicial independence but rarely invoked to restrict judicial interventions in the executive and legislative spheres. The

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [Charter].

<sup>2</sup> *Mills v. The Queen* [1986] 1 S.C.R. 863 at 965 (McIntyre J) [*Mills*]. Quoted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3 at para 52 (Iacobucci and Arbour JJ.) [*Doucet-Boudreau*].

<sup>3</sup> *Doucet-Boudreau* at para 56 (Iacobucci and Arbour JJ.).

<sup>4</sup> *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 [*Eldridge*].

“fusion” approach fundamentally misunderstands both the separation of powers doctrine and Canada’s parliamentary system. There *is* a meaningful separation of powers between the legislative and executive branches, one that is usurped by the Court’s remedial (mis)adventures.

This paper pursues this argument in three stages. First, the current dominance of the fusion theory of parliament is documented and its fundamental misunderstanding of the separation of powers doctrine is explained. The second and third sections of this paper highlight the Court’s recent transgressions against the separation of powers properly understood. The second section shows how the Court’s positive remedies have undermined the fiscal checks established by the still meaningful separation of legislative and executive power. The third section examines the problems created by the judicial management of executive power, a remedial power endorsed by the Supreme Court in *Doucet-Boudreau*. By intruding on executive and legislative power – seizing the sword and the purse – the Canadian judiciary has perpetuated an impoverished understanding of the separation of powers that weakens the constitutional structure of Canada.

### *The Canadian Separation of Powers*

The claim that separation of powers (and hence checks and balances) exist only between the judiciary and parliament, not between the executive and legislature within parliament, has become constitutional orthodoxy. In a passage often cited by the Supreme Court of Canada,<sup>5</sup> Peter Hogg claims that

[t]here is no general ‘separation of powers’ in the Constitution Act, 1867. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only ‘its own’ function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any such separation.<sup>6</sup>

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<sup>5</sup> *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714 at 728 (Dickson J); *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570 at 601 (La Forest J.); *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at para 52 (McLachlin J., dissenting). See also “...the Canadian Constitution does not insist on a strict separation of powers...” *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para 15.

<sup>6</sup> Peter Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (looseleaf), (Scarborough: Carswell, 1997) at 7-24 [Hogg, *Constitutional Law*].

Later, Hogg repeats that “[t]he close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions.”<sup>7</sup> What Canada does have, according to Hogg, is a “little separation of powers doctrine” to protect the judicial functions in s.96 to 100 of the 1867 *British North America Act*.<sup>8</sup> Beyond this important exception, any claim to a constitutional principle of separated powers is simply un-Canadian (or, synonymously, American) nonsense.<sup>9</sup>

This approach apparently stems from Walter Bagehot’s dismissal of the English constitution’s “Supposed Checks and Balances” and his assertion that “a newly elected House of Commons” is “[t]he ultimate authority in the English Constitution.”<sup>10</sup> Bagehot’s perception of a Cabinet-dominated House leads him to his overly simplistic conclusion: the cabinet completely controls the entire government through its control of the House. Bagehot’s logic therefore implies that there has never been an institutional separation in either England or, by extension, in Canada.<sup>11</sup> This view has been bolstered by a misunderstanding of M.J.C. Vile’s classic *Constitutionalism and the Separation of Powers*.<sup>12</sup> Vile offers a ‘pure’ (or strict’) doctrine of separation that is incompatible with parliamentary government because it requires an absolute ‘separation of persons’<sup>13</sup> and an institutional separation that permits no connection between branches.<sup>14</sup> Vile shows,

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<sup>7</sup> Hogg, *Constitutional Law* at 14-5. Hogg suggests that the permission to delegate legislative authority in the Canadian constitution (contrary to the U.S.’s doctrine of non-delegation) is proof that there is no separation of powers in Canada. As discussed below, the delegation (which can be withdrawn) can be construed as simply another example of a “partial agency” which does not constitute the “whole” of the legislative power.

<sup>8</sup> Hogg, *Constitutional Law* at 7-25; *The Constitution Act, 1867* (U.K.) is reproduced in R.S.C. 1985, Appendix II, No.5. Hereinafter the *Constitution Act, 1867* will be referred to as the *British North America Act* [*B.N.A. Act*] for the reasons described by Paul Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) at 276.

<sup>9</sup> If Hogg is making a weaker point – that the Canadian variant of the doctrine simply differs from its American incarnation – he needs to be more careful since such distortions may contribute to the misguided approach to the separation of powers that appears in the cases discussed below.

<sup>10</sup> Walter Bagehot, *The English Constitution* (Cambridge: Cambridge University Press, 2001) at 154.

<sup>11</sup> The extension of British constitutional principles to Canada is an effect of the preamble to the *British North America Act* (1867) which calls for a Canadian constitution “similar in principle” to that of the U.K.

<sup>12</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998) [Vile, *Constitutionalism*].

<sup>13</sup> Meaning that no person participating (to any degree) in the direction of one power may participate (to any degree) in the direction of another (Vile, *Constitutionalism* at 18-9).

<sup>14</sup> Hogg’s insistence that separated powers make no sense for a system of responsible government resembles Vile’s comment that “if one accepts the thoroughgoing view of the separation of powers the idea

however, that the ‘pure’ doctrine was an “ideal-type” never seriously considered by British, Canadian or even American constitutional theorists.<sup>15</sup> Except for a brief period in the English Civil War and (arguably) in some pre-confederation U.S. state constitutions, a ‘pure’ separation has never been attempted nor desired.<sup>16</sup> Nevertheless, Vile’s ‘ideal-type’ separation has somehow slipped into Canadian constitutional thinking as the only possible form of institutional separation – overlooking the fact that even the American system would fail to meet such exacting standards – and thus stripping the Canadian and British variants of all legitimacy and normative force.

However commonplace, the “fusion” theory of parliamentary systems is mistaken. An institutional separation *is* a key element of British and Canadian constitutional thought. Beginning with the English Civil War, and tempered by the experience with the Long Parliament, the principle of separated powers (sometimes known as the ‘balanced’ theory) has a long history that stretches from the Restoration to include both the American and Canadian foundings.<sup>17</sup> The essential constitutional principle, consistently maintained over that long history, is a simple one: it requires that legislative, executive and judicial power not be *wholly* vested in a single individual or single body. While Canada’s particular *implementation* of this principle differs from the American variant, it is difficult to conclude that such operational differences mean “there is no ‘general’ separation of power in the Constitution Act, 1867.” Hogg to the contrary notwithstanding, we shall see that the text of the 1867 Act itself directly relies upon the principle’s continued existence. Without it, the structure and purpose of the 1867 Act would make little sense.

An examination of Canada’s separated powers could begin early, with the Restoration and Locke’s Second Treatise, or late, with the advent of responsible

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of a ‘strong executive’ is a contradiction in terms” (Vile, *Constitutionalism* at 148). Vile’s “pure” doctrine becomes Hogg’s “thoroughgoing view.”

<sup>15</sup> Vile, *Constitutionalism* at 14. After recognising that the separation of powers is often amalgamated with the principle of checks and balances and mixed government, Vile notes that “[t]hese modifications of the doctrine have of course been much more influential than the doctrine in its pure form” (Vile, *Constitutionalism* at 20). Vile’s acceptance that the pure doctrine “has rarely been put into practice” leads one to question whether the pure form’s theoretical usefulness is worth all the confusion it has caused (Vile, *Constitutionalism* at 14).

<sup>16</sup> The calls for a ‘pure’ separation in English theory are discussed in Vile, *Constitutionalism* at 47-57. The pre-confederation U.S. experience with the separation of powers is also documented by Vile, *Constitutionalism* at 139-66.

<sup>17</sup> Vile, *Constitutionalism* at 107-192.

government in the nineteenth century, but Montesquieu's *The Spirit of Laws* provides the most useful starting point. With his explicit adulation for the British model and his oft-noted influence over both the American and Canadian framers,<sup>18</sup> Montesquieu makes the essential link between the seventeenth century British proponents of a balanced constitution and the familiar theory and vocabulary of the American model. Indeed, Montesquieu's treatment of the principle makes clear the pragmatic significance of the separation of powers for any liberal democratic government. For this reason, chapter XI of *The Spirit of Laws*, entitled "Of the Laws which Establish Political Liberty with Regard to the Constitution," remains essential reading for constitutional theorists.<sup>19</sup>

Montesquieu begins this celebrated chapter by acknowledging many different conceptions of liberty and selecting the one he considers key – political liberty. Political liberty, in contrast to 'unlimited liberty,' is "a right of doing whatever the laws permit," or, in modern terms, freedom consistent with the rule of law.<sup>20</sup> Montesquieu's objective is to discern the institutional arrangements that will allow this lawful liberty to flourish. Political liberty, he contends,

is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.<sup>21</sup>

Montesquieu's realist understanding that power corrupts identifies the problem that "moderate government" must confront and overcome. "To prevent this abuse," Montesquieu argues, "it is necessary from the very nature of things that power should be a check to power."<sup>22</sup> At the time he was writing (1748), Montesquieu saw only one nation, England, that had "for its direct end of its constitution political liberty," which is to say that it had adequate checks and balances.

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<sup>18</sup> Vile, *Constitutionalism* at 83; Janet Ajzenstat, *The Once and Future Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 74 [Ajzenstat, *Once and Future*].

<sup>19</sup> Charles de Secondat Baron de Montesquieu, *The Spirit of Laws* (Amherst: Prometheus Books, 2002) at 149-182 [Montesquieu, *Spirit*].

<sup>20</sup> Montesquieu, *Spirit* at 150.

<sup>21</sup> Montesquieu, *Spirit* at 150.

<sup>22</sup> Montesquieu, *Spirit* at 150. It is clear from this quotation that Montesquieu, unlike Vile, believes the idea of 'checks and balances' is inseparable from the separation of powers in theory and in practice.

But in order for power to check power, there must be distinct sources of power with some degree of separation. Following the English approach, Montesquieu recommends dividing governing authority into the now familiar legislative, executive and judicial powers. Simply put, the legislature creates and amends law, the executive governs according to law and the judiciary settles disputes between the state and citizens<sup>23</sup> or between citizens themselves. Power thus delineated must then be assigned to different individuals. Montesquieu understood this assignment as crucial for the prevention of abuse of power:

When the legislative and executive are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>24</sup>

It is necessary to emphasize Montesquieu's point. He is concerned with the potential for a single decision-maker to enforce his preferences *directly* and *absolutely* upon the citizen. He fears a king with the power to devise law (perhaps upon nothing more than regal whim) and who can also direct his police to enforce such a law (perhaps unfairly) without review or appeal. Uniting powers, Montesquieu argues, proves an irresistible invitation to tyranny. A separation of powers, on the other hand, provides opportunities for intervening checks on the power of a single individual or institution.

At the time of Montesquieu's writing, neither legislative nor monarchical absolutism was appealing. While the pre-Civil War experience with Charles I confirmed the fears of a king with absolute prerogatives, the subsequent experience with the Long Parliament raised serious doubts about legislative supremacy. The functional separation of powers, however, could provide an alternative middle-ground. It could limit a tyrannical king by restricting his ability to create or amend law (acts only possible with the participation of the Houses of Commons and Lords) and maintaining an independent

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<sup>23</sup> This is an expansion of Montesquieu's judicial power. He restricted judicial power to the punishment of criminals and disputes between citizens. In the modern regulatory state, it makes some sense to include a limited power of adjudication between citizen and state.

<sup>24</sup> Montesquieu, *Spirit* at 151-2

judiciary. Conversely, a tyrannical legislature, pandering to an ill-motivated majority, can be tempered by a king who chooses to under-enforce the law or by a judiciary that interprets the law in an enlightened fashion. In the English system, absolute power is given to no one; and thus no institution can directly infringe political liberty alone.<sup>25</sup> By establishing three rival institutions with limited power to intercept the legal effect of each other, Montesquieu hopes that at least one will favour political liberty and intervene for its protection.

This checking function does not rely upon an absolute separation of powers or persons in order to achieve the end of ‘moderate government’ and ‘political liberty’. In contrast to Vile’s ‘pure’ separation, Montesquieu follows Bolingbroke and other early English constitutionalists by conceiving the separated powers as a mixture of institutional independence and interdependence. Bolingbroke’s approach (and Montesquieu’s), Vile notes, favours interaction to ensure stability rather than isolation:

Without a high degree of *independent* power in the hands of each branch, they cannot be said to be interdependent, for this requires that neither shall be subordinate to the other. At the same time a degree of interdependence does not destroy the essential independence of the branches.<sup>26</sup>

The important aspect of this coordinacy is not a strict equality of constitutional *power* but, rather, an equality of constitutional *status* amongst the branches. Branches can be unequal in power – indeed, one branch may be clearly predominant – but all branches must be able to both maintain their *status* as legitimate constitutional agents and exercise some limited (though not determinative) influence over the others.

Montesquieu is well known as an inspiration to the founders of the U.S. Constitution and his views are reproduced by Madison in the *Federalist Papers*.<sup>27</sup> Madison attempts to defend the proposed American constitution from the Anti-Federalist charge that its particular arrangement of ‘check and balances’ subverted the principle of

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<sup>25</sup> If one insists on an absolute sovereign then, properly stated, the English “King-in-Parliament” can be considered the actual or technical sovereign.

<sup>26</sup> Vile, *Constitutionalism* at 95.

<sup>27</sup> Alexander Hamilton, John Jay and James Madison, *The Federalist* (New York: Modern Library, 2001) [Madison, *Federalist*].



separated powers by allowing branches to interfere with each other.<sup>28</sup> Against this charge, Madison argues that the Anti-Federalists have simply misunderstood the doctrine. According to Madison, Montesquieu simply meant that the separate branches are each equal in constitutional status. His concern is that “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”<sup>29</sup>

Montesquieu’s logic, Madison argues, “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.” Joint executive and legislative power over judicial selection is an obvious example of permissible inter-branch interactions despite the ‘control’ this places the judiciary under. Again, recall Montesquieu’s aim: to prevent any single institutional actor from having the power to create, enforce and adjudicate law. ‘Partial agency’ and even some degree of ‘control’ maintain openings (however narrow) for competing institutions to defeat or mitigate tyrannical acts. To fulfil its purpose of moderate government, the separation of powers must allow inter-branch interactions, even exertions of influence and control, and only prohibit arrangements which entirely place one power in the hands of another.

Modern critics of responsible government contend that its executive-dominated legislatures are tantamount to a complete transfer of legislative power to executive hands and therefore argue, as Peter Hogg does, that responsible government is “utterly inconsistent” with the separation of powers.<sup>30</sup> From this perspective, the “close link” of executive and legislative power could permit a single body (the Cabinet) or person (the Prime Minister) to “enact tyrannical laws [and] execute them in a tyrannical manner.” Vile suggests that Montesquieu, writing before the modern formulation of responsible government, would, on the basis of the following passage from The Spirit of Laws, agree with the critics:

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<sup>28</sup> For example, Anti-Federalist Robert Yates (Brutus) claimed that separation of powers would be violated because the “the supreme court under this constitution would be exalted above over all other power in the government and subject to no controul.” (Robert Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992) at 53). The U.S. Constitution, of course, is the constitution that Hogg insists *does* have a general separation of powers. The existence of the Anti-Federalist argument proves that the notion of separated powers pre-dates the American constitution and illustrates that the American text is simply one variant of a long standing principle.

<sup>29</sup> Madison, *Federalist* #47 at 309.

<sup>30</sup> Hogg, *Constitutional Law* at 14-5.

...if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.<sup>31</sup>

However, as Madison would recognize, responsible government does not violate the institutional separation unless it grants the *whole* legislative power to the executive. Hogg apparently believes this to be the ultimate and practical consequence of Canada's system of responsible government: an unchecked executive with complete legislative powers. He declares it "obvious that in a system of responsible government there is no 'separation of powers' between the executive and legislative branches of government."<sup>32</sup>

But this wrongly discounts the continuing relevance and effectiveness of constitutional forms and formalities, which, of course, emphasize separate powers. Formally, the Constitution clearly distinguishes between the executive (in the form of the crown), the legislature, and the judiciary. For Hogg, these formal distinctions have been supplanted by more substantive realities. Thus, he believes that in our system of responsible government there is no longer any real distinction between the Prime Minister and the crown, noting that Canada's "shift from a monarchy to a republic could be accomplished with practically no disturbance of present constitutional practice"<sup>33</sup> The same depreciation of formal distinctions underlies his dismissal of a separation of powers between the legislature and executive. Tocqueville observed that modern democrats would – mistakenly and to their detriment – become impatient with formalities and seek always to penetrate to the (apparently) greater reality of underlying substance.<sup>34</sup> Tocqueville hoped that lawyers, as a politically influential class, and one occupationally steeped in forms and formalities, would help democracies resist this dangerous depreciation of forms and formalities.<sup>35</sup> That our leading constitutional expert has fallen prey to the democratic impatience with forms suggests that Tocqueville hoped in vain.

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<sup>31</sup> Montesquieu, *Spirit* at 156; Vile, *Constitutionalism* at 99-102.

<sup>32</sup> Hogg, *Constitutional Law* at 9-17.

<sup>33</sup> Hogg, *Constitutional Law* at 9-28.

<sup>34</sup> Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (Garden City, N.Y.: Anchor, 1969) at 430 (264) [Tocqueville, *Democracy*].

<sup>35</sup> Tocqueville, *Democracy* at 264. See also Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) at 235-239.

Unlike the lawyers Tocqueville hoped for, Hogg is guilty of rhetorical slippage for transforming his description of typical Canadian political process outcomes into an argument about Canada's formal institutional design ("no 'separation of powers'"), leaving his readers with the mistaken impression that executive and legislative power formally and completely reside in the Prime Minister's Office.<sup>36</sup>

Tocqueville was correct in emphasizing the paradoxically substantive importance of forms and formalities, for reasons that Hogg (perhaps inadvertently) points to in the very course of depreciating them. Thus, despite his bold claim that there is no separation between the executive and the legislature, Hogg hedges when he describes the executive's control over the House, noting that "[i]n normal circumstances" the support of the House is "is unwavering and is available for every measure proposed by the government."<sup>37</sup> The qualification – "[i]n normal circumstances" – is crucial because it concedes that the *whole* of legislative power is *not* available to the executive.

The political executive (first minister and cabinet) cannot *always* get its way because of the continuing importance of the apparently negligible formal separation between the three branches. Yes, it is true that the Governor General rarely exercises her prerogative powers;<sup>38</sup> it is also true that the Prime Minister, as leader of the partisan majority in the House, can typically move his agenda through the Parliament with little difficulty. But these regularities can be seen as evidence that the Canadian constitution delivers on its main objective – moderate government<sup>39</sup> – at least in part because the formal powers of, say, the legislative assembly puts outer limits on just how far even the most power-bedazzled political executive is prepared to go. An able Prime Minister,

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<sup>36</sup> Donald Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999) is often cited for this proposition but Savoie is careful to link this idea with the emergence of a 'managerial prime minister,' as discussed below.

<sup>37</sup> Hogg, *Constitutional Law* at 9-12; Hogg later refers to the "fair generalization" that "all measures proposed by the cabinet are assured of passage through the House of Commons" (Hogg, *Constitutional Law* at 9-13).

<sup>38</sup> Under a system of responsible government, the Governor General still maintains her prerogatives but she must exercise them responsibly; that is to say, she may act only if she can find new ministers willing to take responsibility for the action. Prime Minister Tupper's post-election appointments were not executed because Laurier took responsibility for the Governor General's action (or, in this case, inaction). Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart Ltd., 1974) at 38 [Forsey, *Freedom*].

<sup>39</sup> To the extent that there is actual corruption in the Canadian system (patronage and pork-barrelling (see Sid Noel, "Dividing the Spoils: The Old and New Rules of Patronage in Canadian Politics" in Hugh Thorburn and Alan Whitehorn, *Party Politics in Canada*, 8<sup>th</sup> ed., (Toronto: Prentice-Hall, 2001)), judicial review offers few remedies.

Dawson and Ward note, will be “sufficiently wise and far-seeing to limit his demands ... to those which will gain the general acceptance of his followers.”<sup>40</sup> To return to Montesquieu’s point, imagine a tyrannical prime minister in the system of responsible government. Surely one can imagine a Prime Ministerial agenda so extreme that it loses the support of the House. “[G]eneral acquiescence can within limits be assumed,” Dawson and Ward note, “but this co-operation is usually given with some reserve, and the possibility of dissatisfaction and even revolt, though it may be remote, is never entirely absent.”<sup>41</sup> For the Prime Minister to truly impose his personal policy preference, he must persuade Parliament to enact what he prefers and then be able to direct the bureaucracy to execute it in the way he prefers (and, perhaps, ensure that the Court upholds his preferential policy). From the other direction, if there is no formal distinction keeping the Prime Minister from ultimate executive authority then what would stop a Prime Minister defeated in an election from making appointments before his resignation?<sup>42</sup> It is a mistake to assume that constitutional limitations do not exist merely because they are infrequently exercised.<sup>43</sup>

While critics rightly draw attention to the expansion of prime ministerial power, it is also important to recognize that this power remains subject to significant limits. Even Prime Minister Chretien – Jeffrey Simpson’s “Friendly Dictator” – was forced on occasion to respect the will of legislators. Two publicly visible examples are the amendments to the species-at-risk legislation<sup>44</sup> and the addition of sunset-clauses to the anti-terrorism bill.<sup>45</sup> It is difficult to argue, as the ‘fusion’ proponents must, that the separation between executive and legislative power plays *no* role in restraining prime ministerial power.

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<sup>40</sup> R. MacGregor Dawson, W.F. Dawson and Norman Ward, Democratic Government in Canada, (Toronto: University of Toronto Press, 1989) at 47 (Dawson, Dawson, Ward, Democratic Government).

<sup>41</sup> Dawson, Dawson, Ward, Democratic Government at 47.

<sup>42</sup> In 1896, Prime Minister Tupper attempted post-election appointments which were rejected by Lord Aberdeen. This is Forsey’s proof that the ‘rubber-stamp’ theory of the crown is incorrect. Forsey, *Freedom* at 38.

<sup>43</sup> C.f., the power of disallowance which has arguably lapsed because of disuse. In that case, a series of limitations and mutual accommodations preceded claims that it was obsolete. See Hogg, *Constitutional Law* 5-19; Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1991).

<sup>44</sup> Kate Jaimet, “Liberals Demanded Favours to Pass Bill,” *The Ottawa Citizen*, Dec. 27, 2002, A1.

<sup>45</sup> Janice Tibbits and Jim Bronskill, “Terror bill gets facelift: Minister offers 5-year sunset clause on some provisions, refines wording,” *The Montreal Gazette*, Nov. 21, 2001, A13.

If there is in fact a continuing separation of powers, and hence meaningful checks and balances, between the legislature and the executive, the claim that enhanced judicial power is the only check available to secure the benefits of Montesquieuan moderation and liberty for Canadians loses force. Indeed, an overly aggressive expansion of judicial power is better understood as a violating Montesquieu's scheme than as enhancing it. Just as liberty requires some meaningful separation of powers between the executive and legislature for Montesquieu, so it requires an appropriate separation between the judiciary and the other branches. "Again, there is no liberty," says Montesquieu,

if the judicial power be not separated from the legislative and the executive. Were it joined with the legislative, the life and the liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>46</sup>

Although judges will inevitably play some role in "legislation," as every legal realist (and we are all legal realists nowadays) understands, this "partial agency" in the affairs of the legislature – a necessary feature of effective checks and balances – can extend so far that it is no longer well described as "partial." The next section of this paper argues that when the judiciary seizes the traditional legislative power of the purse, as it did in *Eldridge*, it asserts a more complete and undivided control over a policy area than can be justified by Montesquieu's separation of powers. Similarly, judges cannot escape some "partial agency" in the affairs of the executive, but when a court assumes ongoing supervision of the implementation of its order, as it did in *Doucette-Boudreau*, it assumes a degree of control over the executive function incompatible with the healthy checking and balancing between the two branches assumed by the Montesquieuan separation of powers. This is the subject of the paper's third section.

### *Seizing the Purse: Judicial Power Over Public Spending*

The power of the purse in liberal democracies was notoriously a legislative prerogative. "No taxation without representation" is the well known formula, with "representation" referring to the power of elected legislators to approve public spending. This does not mean that the executive plays no role. To the contrary, it traditionally

proposes spending measures for legislative consideration. This partnership of the legislative and executive branches over the power of the purse, based on a separation of their functions, is explicitly set out in ss. 53 and 54 of the *B.N.A. Act*. Section 53 requires any bill “appropriating any Part of the Public Revenue, or for imposing any Tax or Impost” to “originate in the House of Commons,” thus ensuring that any matter of public finance must face the judgment of the popular House (as Janet Ajzenstat puts it, “The Commons cannot be ignored”).<sup>47</sup> Section 54 limits an individual legislator’s power over the purse by requiring all appropriations of public revenue<sup>48</sup> to be introduced by the executive.<sup>49</sup> “It’s because of s.54,” Ajzenstat notes, “that the Commons is presented with a coherent program of spending and taxing legislation rather than a shopping list of competing demands from individual representatives.”<sup>50</sup> Working together in classic Madisonian fashion – i.e., through the “partial agency” of separate institutions in each others affairs – these “crucial sections of the 1867 constitution”<sup>51</sup> enact an elegant scheme for effective but shared control over finance: the Commons may reject the Cabinet’s tax and spending plans but they may not initiate their own; Cabinet can propose a cohesive plan but cannot enact it without the approval of the people’s representatives.<sup>52</sup>

These mutually reinforcing checks are undermined when the Court exercises not only its inescapable power of interpreting the constitution in order to adjudicate a concrete dispute, but also seizes the power of the purse in order to remedy a finding of unconstitutionality. This is what the Court did in *Eldridge*. In response to a constitutional challenge by deaf patients, the Court found that the s. 15 equality guarantee

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<sup>46</sup> Montesquieu, *Spirit* at 152.

<sup>47</sup> Ajzenstat, *Once and Future* at 65. The increasing use of special warrants amounts to an executive infringement of this constitutional restraint and is no less offensive than the judicial avoidance of this section. For the problem of special warrants, see David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (University of Toronto Press, 1995, 82-5).

<sup>48</sup> “Appropriation of any Part of the Public Revenue, or of any Tax or Impost”

<sup>49</sup> Specifically, the bill must be “first recommended to [the] House by Message of the Governor General in the Session in which such ... Bill is proposed.”

<sup>50</sup> Ajzenstat, *Once and Future* at 65.

<sup>51</sup> Ajzenstat, *Once and Future* at 65.

<sup>52</sup> Ss. 53 and 54 also illustrate an important aspect of the adaptation of the separation of powers to parliamentary government. Appropriation is a classic legislative power and here the executive is playing a role in the direction of legislative power. Blackstone and other English disciples of Montesquieu conceived of the legislative power as being a ‘mixed’ power shared by the monarch and both houses of the legislature. Thus, contrary to Bagehot, the ultimate authority is not the House of Commons but, rather, the King-in-Parliament. This aspect of the separation of powers is significant but not directly relevant to the separation of powers with respect to the judicial power. See Vile, *Constitutionalism* at 92.

of the *Charter* includes a right to “effective communication” in the delivery of health services.<sup>53</sup> The Court ruled that “the appropriate and just remedy” for B.C.’s failure to supply sign language interpreters was not only “to grant a declaration that this failure is unconstitutional” but also “to direct the government of British Columbia to administer the *Medical and Health Care Services Act* ... and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1).”<sup>54</sup> While the Court affords some legislative deference in terms of remedial options, Justice La Forest notes that “it is probably fair to surmise that sign language interpretation will be required in most cases.”<sup>55</sup> In other words, the government is ordered to supply sign language interpreters as part of its healthcare budget. This judicial end-around of ss.53 and 54 means that Court’s spending does not require popular approval and avoids difficult questions of policy tradeoffs.

In a cost-free world – the abstract, case-specific environment the Court inhabits – everyone would agree to supply hospitals with sign language interpreters since there would be no reason to do otherwise. The real world is not cost free, however, a fact that the Court blithely discounts by noting that “financial considerations alone may not justify *Charter* infringements”.<sup>56</sup> The real-world issue is not whether interpreters are a justifiable public good but whether they can be afforded given the potentially painful tradeoffs between goods that can be purchased with scarce public funds. Even for deaf patients, interpreters do little good if they are signing ‘you will have to wait six months to use the MRI.’ Because it makes its decisions across all policy fields, the executive is far better placed to see and evaluate these tradeoffs than a Court focused upon a single complainant. Given that granting a benefit is always easier than taking one away or denying it, the Court’s unifocal approach necessarily favours additional spending and, crucially, it does so without the burden of responsibility. Essentially, the Court gets to play Santa Clause while leaving others to be the Taxman.

In the Court’s defense, *Eldridge* can be characterized as nothing more than a judicial demand for governments to “take special measures to ensure that disadvantaged

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<sup>53</sup> *Eldridge* at para 80 (La Forest J.).

<sup>54</sup> *Eldridge* at para 95 (La Forest J.).

<sup>55</sup> *Eldridge* at para 82 (La Forest J.).

<sup>56</sup> *Eldridge* at para 85 (La Forest J.). See also *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177.

groups are able to benefit equally from government services.”<sup>57</sup> Technically, the Court’s actual s.24 remedy supports this interpretation since the Court suspended its declaration of invalidity for six months to allow for the government to remedy the unequal treatment of deaf patients. According to the Court, the government has a choice: it can provide health care in an egalitarian fashion or it can decide not to provide service at all. Despite the Court’s rhetoric of deference – “It is not this Court’s role to dictate how this is to be accomplished”<sup>58</sup> – the decision to fund (non-negotiable from the Court’s perspective) is the end of the real policy debate. No one seriously believes that Canadian governments will completely abandon public health care. In practice, everything must be made to accommodate the judicially-privileged budgetary demand.

The Court’s remedial action is analogous to the familiar process of attaching riders to major legislation in the United States. It is common in the American budgetary process, with its ‘multiple cracks’ structure, for individual legislators to attach specific pet spending projects to large appropriation bills safe in the knowledge that other political actors (who will often have their own preferences attached) will not jeopardize the entire bill. This is precisely the form of decentralized ‘log-rolling’ with public funds that s.54 is meant to ensure against. In *Eldridge*, the Court’s confidence that universal health care will be maintained in British Columbia allows them to ‘tinker at the margins’ by spending public funds as they see fit while supposedly denying themselves the final word on the subject.<sup>59</sup> This technique must be exercised cautiously to avoid provoking a repeal of the underlying legislation. Perhaps conscious of the policy result of *Schachter* – where the judicial extension of maternity benefits to adoptive parents led to a reduced period of leave for all parents<sup>60</sup> – the *Eldridge* Court carefully notes that the cost of providing interpreters is (in their opinion) “only \$150,000.”<sup>61</sup> The Court’s figure fails to include funding that flows from the decision’s precedential value which is noteworthy because

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<sup>57</sup> *Eldridge* at para 77 (La Forest J.).

<sup>58</sup> *Eldridge* at para 96 (La Forest J.).

<sup>59</sup> It is, of course, unclear whether a public benefit, once granted, can ever be entirely repealed. This appears to be part of the Court’s logic in *Dunmore v. Ontario (Attorney General)* [2001] 1 S.C.R. 1016.

<sup>60</sup> A result that has driven defenders of judicial power to support more intrusive judicial remedies. See Kent Roach, “Remedial Consensus and Dialogue Under The *Charter*: General Declarations and Delayed Declarations of Invalidity,” 35:2 *U. Brit. Colum. L. R.* 211 (2001-2002) at 224.

<sup>61</sup> *Eldridge* at para 87 (La Forest J.).



the decision has already been used by courts to extend health care benefits to cover the additional costs of autistic children<sup>62</sup> and chronic pain sufferers.<sup>63</sup>

Even if one concedes that the Court's newly mandated benefit is relatively cheap, however, its eagerness for cost-effective improvements to the health care system remains misguided. The proper arena for considering such reforms is the regular executive-legislative process. As a result of their complainant-centred approach, the Court makes the assumption that an unsuccessful policy outcome is evidence of procedural unfairness towards vulnerable minorities. Given the reality of scarce resources, however, ameliorative programs cannot be unlimited, and only elected representatives, as the recognized agents of the entire citizenry, can legitimate the often harsh, seemingly arbitrary but altogether necessary limits of these laudable programs. These limits, of course, need not be permanent and proponents of extending such programs can seek future legislative revisions to accommodate their concerns. Absent specific evidence of procedural unfairness, the statutory dimensions of ameliorative programs should be respected.

By giving themselves the authority to expand benefits, the Court has accumulated legislative and executive power over the public purse. Their new 'unified' power over public finance means that the Court can hear a complaint (their traditional judicial power), propose a spending remedy (exclusively an executive power under s.54) and shield that remedy from legislative scrutiny (thwarting the purpose of s.53). The Court's power is resolutely undivided – a single institution has complete control over this (admittedly discrete) policy issue in a manner precisely proscribed by the constitution. Consider the perspective of an interest group seeking access to public spending. The centralized power to initiate legislation (s.54) means there are only a few high-level access points for lobbying and, even with access, the interest will be competing against many others for executive attention. Ministerial and/or bureaucratic support does not mean automatic policy success since the proposal will still need to survive legislative scrutiny. Even with an executive-controlled legislature, the process requires considerable time and careful effort. However, if the interest group can frame its demand as a 'right'

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<sup>62</sup> *Auton v. British Columbia (Attorney General)* 2002 BCCA 538 (B.C.C.A.).

<sup>63</sup> *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54.

then the burdens and pay-offs dramatically shift. Despite the high costs of litigation, a judicial remedy using public funds is indisputable, effective almost immediately and permanent. Given the contrast with a temporary legislative victory, it is inevitable that more groups will use the courts to achieve their preferred policy outcomes. Allowing such a judicial short-circuit over the onerous requirement of s.53 and s.54 undermines the core fiscal tenet of responsible government.

*Seizing the Sword: The Judicial Assumption of Executive Power*

Just as *Eldridge* seizes the traditional legislative power of the purse, so *Doucet-Boudreau* seizes the “sword” of executive power. Traditionally, the executive has the power to implement law, including court-made law. Once a case concluded, giving effect to the legal ruling or order was a matter for executive actors. True, this gave non-judicial actors some role in shaping the actual impact of a law or legal ruling, but that is an inherent aspect of the “partial agency” of the branches in each others affairs that underlies healthy checks and balances. Nor did this mean that the judiciary had no comeback to a perceived executive failure to properly implement its order, but that comeback depended on litigants bringing a new case. *Doucet-Boudreau* overcame this traditional constraint on judicial power by permitting a court to maintain continuing supervision of its order in the same case. The case arose under section 23 of the Charter which includes a minority language education right that the Court has interpreted (in *Mahe v. Alberta*) to require specific programs and facilities for the minority language group where “numbers warrant.”<sup>64</sup> The trial judge ordered five Nova Scotia school districts to remedy their breach of this right by building, before a specified deadline, the homogeneous French-language secondary schools necessary to serve their Francophone communities. The Supreme Court decided that a judge who finds an unjustified violation of s.23 has the power to retain jurisdiction in order to hear status reports detailing efforts at compliance (and, presumably, issue new orders in response to those reports)<sup>65</sup> as the trial judge in the instant case had ordered. As the *Doucet-Boudreau* majority recognizes, this remedy

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<sup>64</sup> *Mahe v. Alberta* [1990] 1 S.C.R. 342.

<sup>65</sup> The trial court judge’s power to issue new orders was expressly rejected by the Nova Scotia Court of Appeal but the Supreme Court of Canada hinted that this power was never seized as part of the remedy.

gives the supervising judge “functions that are principally assigned to the executive,” though apparently it only “touches” on those functions.<sup>66</sup>

Does the judicial remedy employed in *Doucet-Boudreau* simply “touch” on executive power? In Madisonian terms, does it remain an appropriate example of the “partial agency” required by checks and balances? Consider the actual role played by Nova Scotia Trial Judge LeBlanc in his retention of jurisdiction in *Doucet-Boudreau*. In the reporting sessions, he resolved issues

concerning, among other things, the type of construction of these school facilities, whether they would be new school facilities or the renovation of existing buildings, submissions with respect to other school facilities which were not part of the original application, and extending to such minute detail as, for example, the type of ventilation system which would be included in the school facilities.<sup>67</sup>

Justice Flynn of the Nova Scotia Court of Appeal concluded that “[i]n conducting these reporting sessions, the trial judge was acting more in the capacity of an administrator than as a judge.”<sup>68</sup> The Supreme Court disagreed and suggested that these orders do not “depart unduly or unnecessarily from their role of adjudicating disputes.”<sup>69</sup> Given the range and detail of the trial judge’s supervision, however, it is difficult to accept the remedy as simply ‘touching’ on executive power. It remains to determine whether it nevertheless qualifies as “partial agency.”

While the *Doucet-Boudreau* assumption of executive power raises key questions of institutional competence – are courts better than bureaucrats at evaluating ventilation systems? – the more relevant consideration for this paper is its departure from that part of the separation of powers captured by the traditional common law notion that a judge’s role ends with judgment (*functus officio*). By overcoming the *functus officio* norm, the *Doucet-Boudreau* remedy eases the restraint inherent in the requirement that judicial power be exercised collectively. Even the most ardent social science positivists, who insist judicial decision-making is explained by personal preference, concede that a degree

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<sup>66</sup> *Doucet-Boudreau* at para 56 (Iacobucci and Arbour JJ.).

<sup>67</sup> *Doucet-Boudreau* 2001 NSCA 104 at para 16 (Flinn J.A.).

<sup>68</sup> *Doucet-Boudreau* 2001 NSCA 104 at para 16 (Flinn J.A.).

<sup>69</sup> *Doucet-Boudreau* at para 56.

of restraint emerges from the fact that judicial power is institutional and not personal.<sup>70</sup> Thus, whatever the individual preference of an appellate court judge, he or she requires the support of colleagues in order to make that preference law. This logic applies more broadly to the judiciary as a whole. If the decision is based on objective reasoning instead personal preference (to the extent possible) then one would expect every judge to reach the same result in any given case. Since law is (to some degree) undeniably subjective, such mechanical jurisprudence is impossible (and probably undesirable). Given this inherent uncertainty, judicial power is entrusted to a *body* of men and women. From this perspective, the *functus officio* rule makes considerable sense. Once a decision is made, the judge's power is finished. Therefore, any residue of personal preference is subjected first to the decisions of elected actors (who may decide to ignore or respond creatively to the decision) and then, in event of non- or partial compliance, to a *new* judge. The retention of jurisdiction in *Doucet-Boudreau* undermines this restraint and increases the potential impact of a judge's personal policy preference.

Given the existence of an appeal, this may appear a minor point. Individual preference, after all, will surely be restrained by appellate court judges. Yet, there is something odd about a remedy that seeks to avoid re-litigation (the primary justification for the retention of jurisdiction) but relies upon the possibility of further litigation for its legitimacy. Even in a transaction cost-free universe, however, the retention of jurisdiction still increases the *relative* power of the individual judge with respect to the judicial power as a whole. One might object that this is an internal matter for the judiciary, rather than a question of inter-branch separation, but the danger of unifying executive and judicial power is surely exacerbated by this increase in personal power. Unified power wielded by a single institution is dangerous enough; wielded by a single judge it is even more problematic.

Within the discrete sphere of minority language education policy, the accumulation of power Montesquieu feared is manifest. The judiciary legislates by

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<sup>70</sup> Forrest Maltzman, James F. Spriggs II, Paul Wahlbeck, *The Collegial Game* (New York: Cambridge University Press, 2000). Such collective activity is not incompatible with a preferential model, as argued in Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) at 100n50, 404.

interpreting s.23 to require linguistic minority “management and control” of facilities,<sup>71</sup> applies it to the litigants by resolving a dispute (finding a constitutional violation in *Doucet-Boudreau*) and assumes a governing role over compliance (the continuing supervisory role established by the remedy). There is no role for other branches to obstruct, modify or respond other than simple compliance with judicial preferences. This arguably goes well beyond the kind of “partial agency” in another branch’s affairs that our constitutional system requires.

For some jurists, this concern is outweighed by the benefits of such an effective remedy. Dissenting from his Court’s invalidation of the remedy, Justice Freeman of the Nova Scotia Court of Appeal says that the reporting remedy “appears to be a pragmatic approach to getting the job done expeditiously.”<sup>72</sup> According to Freeman, “the danger of oppressive judicial intervention is very real” but not a concern in this case because the trial judge made correct decisions.<sup>73</sup> Even if Freeman is right and these particular judgments are ‘correct,’ the establishment of such an intrusive remedy as a precedent cannot be ignored. Once the separation is breached in this fashion, the judicial branch will be tempted to use its enhanced remedial power whenever the constitutional separation interferes with the imposition of their policy preferences. The majority’s answer to this concern is to weakly note that “[d]etermining the boundaries of the court’s proper role... cannot be reduced to a simple test or formula; it will vary according to... the context of each case.”<sup>74</sup> Of course, judging the variance necessary to accommodate a given context is assumed to be a matter wholly within the Court’s discretion. However, this, too, infringes the Madisonian understanding of what counts as appropriate “partial agency.” Madison is quite clear that it is no longer *partial* agency when one branch has the exclusive power to define the constitutional powers of the other branches:

The several departments being perfectly coordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.<sup>75</sup>

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<sup>71</sup> *Mahe v. Alberta* [1990] 1 S.C.R. 342.

<sup>72</sup> *Doucet-Boudreau* 2001 NSCA 104 at para 73 (Freeman J.A., dissenting).

<sup>73</sup> *Doucet-Boudreau* 2001 NSCA 104 at para 83 (Freeman J.A., dissenting).

<sup>74</sup> *Doucet-Boudreau* 2003 SCC 62 at para 36 (Iacobucci and Arbour JJ.).

<sup>75</sup> Madison, *Federalist* #49 at 322.

*Conclusion*

Given their interest in expanding judicial power, it is hardly surprising that the legal elite would favour a “little separation of powers” doctrine effective only in limiting encroachments on judicial independence. An obvious strategy for a rationally self-interested Court would be to forcefully insist upon the separation when the judiciary are the subject of executive or legislative interference – as the Supreme Court of Canada did in the *Reference Re: Judicial Remuneration*<sup>76</sup> – and emasculating the principle when their power over other branches is at stake. *Eldridge* and *Doucet-Boudreau* demonstrate the Court’s willingness to ignore the formal separation of powers when it impedes their efforts to enlarge the scope of judicial power. If the Court is permitted these indulgences, Montesquieu’s principle of separated powers is undermined. While malevolent judicial tyranny is hardly imminent in Canada, the loss of the most vital safeguard against it should concern all those concerned with liberty and moderate government.

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<sup>76</sup> *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)* [1997] 3 S.C.R. 3.