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David Mullan
Queen's University

Antonella Ceddia
Ontario Court of Appeals

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The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective*

DAVID MULLAN** AND ANTONELLA CEDDIA***

INTRODUCTION

Over the past decade, Canada, following the lead of other Western democracies, has engaged in numerous, and at times fundamental, experiments in reducing or reconfiguring the role played by government. These experiments have been conducted, with varying levels of intensity and in varying forms, among the provinces and territories of Canada, as well as at the federal level. Foremost among the governments committed to this enterprise have been those of the provinces of Alberta (since 1992), Ontario (since 1995), and, from late 2001, British Columbia. The objective of the Canadian governments which have enthusiastically espoused this project has been in part making their jurisdictions more hospitable to international investment and other forms of participation. The restraints of public law in general, and regulatory oversight in particular, seem to many to be incompatible with increasing globalization within this environment.

Great public controversy has surrounded the efforts of these governments, despite the fact that they were elected because of their commitment to reducing the role of government and to freeing the private sector from regulatory “shackles.” The governments of Alberta and Ontario were indeed re-elected on the basis of such a commitment. Particularly in Ontario, the public controversy has translated into a barrage of legal challenges. Until very recently, however,

* We are very grateful to Anita Anand, Faculty of Law, Queen’s University for assisting our understanding of the way in which the Ontario Securities Commission and the various Self Regulatory Organizations in the Ontario financial sector intersect for regulatory purposes. The general Canadian legal literature in this domain is surprisingly slight. However, in writing this paper, we found useful the following: Margot Priest, *The Privatization of Regulation: Five Models of Self-Regulation*, 29 OTTAWA L.R. 233 (1997-98); Karen Beattie, *Fairness, Openness and Self-regulation: An Examination of Administrative Law Values and the Use of Voluntary and Self-regulatory Measures for Environmental Protection*, 14 CAN. J. ADMIN. L. & PRAC. 1 (2000); and Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L.REV. 813 (2000).

** Osler, Hoskin & Harcourt Professor of Constitutional and Administrative Law, Queen’s University, Kingston, Ontario.

*** B.A. (Tor.), M.A. (Waterloo), LL.B. (Queen’s), Law Clerk, Ontario Court of Appeal, Toronto, Ontario.

the courts were rarely receptive to proceedings aimed at preventing the government from carrying through with its policies.

This paper makes two broad inquiries: First, what role do Canadian courts play in constraining government exercises of this kind? Second, how, if at all, did or should public law adapt or respond to the new realities? We present two general theses. First, the opportunities for using the courts to constrain governments in the initiation of these policies have been, and may well continue to be, very restricted. Only if the Supreme Court of Canada espouses the philosophy that the Canadian Charter of Rights and Freedoms is more of a social charter than has generally been supposed will the door open to more broad-based questioning of such government actions. Second, the prospects for any dramatic reshaping of the general principles of public law as a means of constraining the implementation of these policies and policing their possible fallout are equally unpromising.

The first conclusion is based primarily on the absence to this point of any strong or pervasive set of constitutional norms that operates to restrict governments and legislatures in the legislative effectuation of mandates for deregulation, privatization, and downsizing. The second hypothesis is founded on the unwillingness of Canadian courts to provide a substantive check on the exercise of executive power.¹ It is also derived in part from three rather different and, to an extent, reassuring observations. First, in many instances, the reconfigurations within government have not in reality taken the affected areas outside of public law principles. Second, existing principles of general or common law have at least some capacity to police the way in which a “liberated” sector operates. Third, some domains of public law appear to contain the potential for growth and, as such, have at least limited capacity for providing extended bases for accountability when a new regime misfires in a way that harms individuals.

1. See David J. Mullan, *The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality*, in *THE JUDICIARY AS THIRD BRANCH OF GOVERNMENT: MANIFESTATIONS AND CHALLENGES TO LEGITIMACY* 313 (Mossman & Otis eds., 2000).

I. THE STORY OF THE COURTS' INVOLVEMENT TO THIS POINT

A. *The Limited Success of Preemptive Strikes*

Most of the litigation arising out of government reform was commenced in Ontario, with a view to preventing the Conservative government from carrying through with its policies, and targeted the processes of restructuring the health care, education, and municipal systems. As noted, the vast majority of these challenges were singularly unsuccessful.²

In large measure, those who brought the actions relied upon principles of judicial review of administrative action to attack the way in which the government was proceeding. However, faced with broad legislative grants of discretion, the Ontario courts were not disposed to deploy the general principles governing review for abuse of discretion in Canadian law to question the exercise of those powers by Ministers of the Crown or their delegates, such as the Health Services Restructuring Commission, the body charged with the reformation of the delivery of medical care in the province.³ Although some of them may have disliked what was going on from a policy perspective, the judges felt obliged to respect the purposes of the legislation as reflected both in its overall structure and statement of objectives, and in its conferral of broad statutory discretion. Only in relation to the government's early and frequent use of so-called "King Henry VIII" clauses was there even a suggestion that there might be an opportunity in an appropriate case to invoke a very inchoate constitutional anti-delegation doctrine.⁴ In general, however, the substance of the legislation and the manner of its implementation were beyond the judicial ken.

Similarly, the courts were not at all inclined to burden the executive and its delegates with extensive procedural obligations in the decisionmaking processes attending the realization of legislative objectives. As reflected in

2. The only early successes were in cases involving failure to follow legally required process. See *Scarborough v. Ontario (Attorney Gen.)*, 32 O.R.3d 526 (Ont. Ct. 1997) (appointment of transitional trustees for municipalities about to be amalgamated held to be *ultra vires*); *Murphy v. Ontario (Attorney Gen.)*, 28 O.R.3d 220 (1996); *Hewat v. Ontario*, 37 O.R.3d 161 (Ct. App. 1998); *Dewar v. Ontario*, 37 O.R.3d 170 (Ct. App. 1998) (each involving *ultra vires* dismissals of members of boards and tribunals).

3. The scene-setting judgment was that of Justice Archie Campbell in *Pembroke Civic Hosp. v. Ontario (Health Serv. Restructuring Comm'n)*, 36 O.R.3d 41 (Ont. Div. Ct. 1997).

4. "King Henry VIII" clauses are provisions in statutes whereby the executive is given authority to dispense with observance or alter the terms of legislation. See *Ontario Pub. Sch. Bd. Ass'n v. Ontario (Attorney Gen.)*, 151 D.L.R.4th 346, 362-65 (Ont. Ct. 1997).

general Canadian due process or procedural fairness law, the common law or implied procedural obligations of those engaged in broad-based, polycentric decisionmaking are quite limited.⁵ More particularly, in the absence of an Administrative Procedure Act model for “notice and comment” in rulemaking in all jurisdictions except Quebec,⁶ the courts have been unwilling to impose such an obligation on a common law basis.⁷

Conscious of the constraints that accepted principles of legislative sovereignty place on attacks on the exercise of statutorily delegated power, some challengers attempted either to incorporate constitutional grounds into their claims, or to base their claims entirely on such grounds. Claims were based variously on the Constitution Act, 1867,⁸ and the Canadian Charter of Rights and Freedoms.⁹ Here too, however, until very recently, there was little fertile ground; the challenges frequently foundered due to insufficient textual support in the actual words of the Constitution. Thus, an attempt to prevent the Ontario government from carrying through with the most spectacular example of municipal amalgamation—the creation of a mega-city out of the existing City of Toronto and surrounding cities and municipalities—failed on the basis that the Constitution Acts contained no textual support whatsoever for the proposition that municipalities had some kind of constitutional status in Canadian law.¹⁰ Similarly, invoking freedom of religion—guaranteed by section 2(a) of the Charter—did not provide a basis for a claim that religiously-affiliated hospitals operating within the public health system were exempt from the downsizing and amalgamation objectives of the Health Services Restructuring Commission.¹¹

5. See *Pembroke Civic Hosp.*, 36 O.R.3d at 47; see also *Wellesley Cent. Hosp. v. Ontario (Health Serv. Restructuring Comm'n)*, 151 D.L.R.4th 706, 708 (Ont. Div. Ct. 1997).

6. Since 1986, the Quebec Regulations Act, S.Q., ch. 22, §§ 11-14 (1986) (Can.), has contained a “notice and comment” procedure for proposed regulations.

7. See, e.g., *Canadian Ass'n of Regulated Imp. v. Canada (Attorney Gen.)*, 2 F.C. 747 (Ct. App. 1994).

8. 30 & 31 Vict., c.3 (Eng.), reprinted in R.S.C., app. II, no. 5 (1985) (Can.).

9. Constitution Act, 1982 (Canadian Charter of Rights and Freedoms), sched. B, pt. I, ch. 11 (U.K.) [hereinafter the Charter].

10. *East York (Borough) v. Ontario (Attorney Gen.)*, 34 O.R.3d 789 (1997), *aff'd*, 153 D.L.R.4th 299 (Ont. Ct. App. 1997).

11. See *Russell v. Ontario (Health Serv. Restructuring Comm'n)*, 114 O.A.C. 280 (1998), *aff'd*, 175 D.L.R.4th 185 (Ct. App. 1999).

B. Signs of a Changing Judicial Environment?

Nonetheless, in the past few months, there have been some surprising (in the light of the prior track record) successes based on constitutional arguments. Given the unwillingness of the Ontario Court of Appeal to find any basis in “freedom of religion” to keep religiously-affiliated hospitals open, *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)*¹² was the first of these surprises. There, the Court remitted a decision of the Commission ordering a hospital in Ottawa to reduce drastically the services it was offering. The hospital in question, Hôpital Montfort, is a hospital that attends to the health care needs of many of the large francophone community who live in Canada’s capital. As a dedicated francophone institution, it is unique not only in Ottawa, but in the province.

In quashing the decision of the Commission and remitting the matter to the Minister to be reconsidered in accordance with the principles identified in its judgment, the Court relied extensively on four underlying principles of the Canadian Constitution recently recognized by the Supreme Court of Canada in *Reference re Secession of Quebec*.¹³ Those principles, which the Supreme Court stated could on occasion have free-standing operation outside the actual text of the various Constitution Acts, were democracy, federalism, constitutionalism and the rule of law, and the protection of minorities. In *Lalonde*, the applicants for relief had seized on the last of these, claiming that the Commission had disregarded the Hospital’s status as an important dimension in the vitality of Ottawa’s minority francophone community. The Court agreed and thereby opened a door that many had thought closed—the ability to challenge the substance of the government’s reorganization efforts, not just by reference to the text of the Constitution, but also by reference to underlying constitutional principles.

Leaving aside the controversial issue of the extent to which any appeal to non-text based or “unwritten” constitutional principles on a free-standing basis is justifiable,¹⁴ there are a number of reasons to be very cautious in treating

12. 56 O.R.3d 505 (Ct. App. 2001), *aff’g* 181 D.L.R.4th 263 (Ont. Div. Ct. 1999).

13. *Id.* at 545-46 (citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (involving the question of whether Quebec could secede from Canada and, if so, under what conditions)).

14. More recently, the Supreme Court of Canada rejected an attempt to use the “unwritten principles” of the Canadian constitution as a means of invalidating federal legislation that gave the executive branch extensive ability to resist disclosure of information in the context of both administrative proceedings and litigation. In delivering the judgment of the Court in *Babcock v. Canada (Attorney Gen.)*, [2002] S.C.C. 57, Chief Justice McLachlin stated: “The unwritten principles must be balanced against the principle of

Lalonde as providing a broad basis for constitution-based attacks on government engagement in restructuring and downsizing. First, the circumstances of the hospital in question were unusual, and it is difficult to think of many examples in which a court could comfortably rely on this or any other of the four underlying principles to justify intervention in the implementation of a government's restructuring mandate.¹⁵ Second, the Court of Appeal took particular pains to point out that it was not deciding that the Hospital was immune from legislative (as opposed to discretionary, executive) closure. That question was left for another day. Third, there was textual support for the review here—if not in the Constitution Acts directly, then in the language and objectives of the Ontario French Language Services Act.¹⁶ In holding that the Commission had abused its discretion by failing to take relevant considerations into account, the Court related the terms of the FLSA to the underlying principles. Fourth and finally, though it now seems unlikely that the Hospital will either close or reduce its operations significantly, the Court order was not to the effect that the government was obliged to keep the Hospital open. Rather, the Court directed the Minister to reconsider the whole issue in accordance with proper principles. All of this suggests a precedent that may provide little room for others disposed to challenge the ongoing implementation of the government's commitment to its downsizing and privatization agenda.

In the context of welfare, health services, and education, however, there remain some open questions as to the extent to which the government can legitimately withdraw support from those domains. In part, those uncertainties stem from the interdependent relationship that exists between the provinces and the federal government. Thus, the Canada Health Act,¹⁷ under which the federal government provides essential financial support for the maintenance of provincial health care systems, presently operates as a severe constraint on the extent to which provincial governments can privatize their health care systems without jeopardizing funding. This is an issue of significant and ongoing political controversy.¹⁸ Similar constraints are also operative with respect to

Parliamentary sovereignty." *Id.* ¶ 55. Though the precise meaning of this sentence is opaque, what is clear is that the Court is issuing a strong caution against the ready use of such principles as a vehicle for challenging legislation.

15. Again, it is cautionary in this regard to recall the earlier jurisprudence in this area. See *supra* notes 10-11 and accompanying text.

16. R.S.O., ch. F.32 (1990) (Can.) [hereinafter FLSA].

17. R.S.C., ch. C-6 (1985) (Can.).

18. See Katherine Cherniawsky, *Enforcement of Health Care Rights and Administrative Law*, 4 HEALTH L.J. 35 (1996) (discussing legal issues surrounding the terms and enforcement of the provisions of the

federal-provincial cost-sharing arrangements in the fields of welfare and education, as provided for in the Federal-Provincial Fiscal Arrangements Act.¹⁹

Beyond this, though, the possibilities for constitutional challenge have not yet been exhausted.

Three judgments of the Supreme Court of Canada, as well as aspects of the Court's general approach to equality issues under section 15 of the Charter, provide ammunition for those challenging government cutbacks to forms of basic support. The Supreme Court held, early on, that the Charter constrains governments but not the private sector—at least not directly.²⁰ It also determined that, for these purposes, the mere fact that a decisionmaker derived authority from a statutory source did not mean that that decisionmaker was part of government and subject to the Charter. Thus, the Court refused to bring state universities and hospital boards within the reach of the Charter in a series of decisions challenging the mandatory retirement policies of those institutions. They were, in their day-to-day operations, too autonomous of government to be included.²¹

Subsequently, in *Eldridge v. British Columbia*²² and in *New Brunswick (Minister of Health and Community Services) v. G (J)*,²³ the Court refined its position on what constituted government action for purposes of the application of the Charter. *Eldridge* involved hospitals and the issue of inadequate funding of services for the hearing-impaired in need of medical assistance and, in particular, “translation” facilities. The Court held that bodies generally not subject to the Charter could become subject to it when engaged in the fulfillment of, or carrying out of, a specific government objective, policy, or program. This definition included the actual delivery of medical services by British Columbia hospitals. Moreover, the Court proceeded to hold that the

legislation). See also STANLEY H. HARTT & PATRICK J. MONAHAN, *THE CHARTER AND HEALTH CARE: GUARANTEEING TIMELY ACCESS TO HEALTH CARE FOR CANADIANS* (2002), in which the authors argue that if governments fail to deliver adequate health care, section 7 of the Charter and its protection of “life, liberty and security of the person” provides a basis for arguing that statutory barriers to access to private health care facilities are unconstitutional.

19. S.C. 1985, d F-8.

20. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 232.

21. See, e.g., *id.*; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, 452; *Stoffman v. Vancouver Gen. Hosp.*, [1990] 3 S.C.R. 483, 485. *But see Douglas/Kwantlen Faculty Ass'n v. Douglas College*, [1990] 3 S.C.R. 570.

22. [1997] 3 S.C.R. 624.

23. [1999] 3 S.C.R. 46.

Charter's equality guarantee was infringed by the absence of support for the hearing-impaired.²⁴

This judgment obviously has ramifications for outsourcing and privatization in at least two ways. First, to the extent that a private operator is nonetheless constrained by a government mandate or policy, the guarantees of the Charter potentially reach the activities of that private operator. This will be discussed in greater detail later. Secondly, in the domains of health and welfare, whether within typically public or even some privatized realms, there may be some basis for asserting not just a right to the continuation of certain kinds of services, but also to the initial provision of those services. In *Eldridge*, the springboard for such a claim was section 15 and the substantive equality protection that the Court has extrapolated from that provision.²⁵

In the later case of *G.(J.)*, the entry point was section 7 and the right to "life, liberty and security of the person," and the concomitant right not to be deprived of those rights save in accordance with the "principles of fundamental justice."²⁶ The majority of the Supreme Court conceived of "security of the person" as encompassing psychological integrity, and held that the state deprived a mother of that right when it failed to provide for legal representation of her interests upon applying for renewal of an order giving it custody of her child.²⁷ In the circumstances of this case, the state was obliged to ensure that the mother had legal representation.

The third Supreme Court of Canada judgment that will undoubtedly have an impact on challenges to government restructuring is *Dunmore v. Ontario*.²⁸ This case is particularly important given the extent to which many of the kinds of exercise about which we are concerned will have a dampening effect on organized labor and participation in mandatory collective bargaining. In *Dunmore*, the Court, in what was a very clear change of direction from its previous jurisprudence in this area,²⁹ held that "freedom of association" under section 2(d) of the Charter protected the right of agricultural workers in the province of Ontario to organize collectively under the province's labor relations

24. *Eldridge*, [1997] 3 S.C.R. at 682.

25. *Id.* at 680.

26. *G.(J.)*, [1999] 3 S.C.R. at 80.

27. *Id.* at 76, 96.

28. [2001] S.C.C. 94, 207 D.L.R.4th 193.

29. See, in particular, the so-called "labour trilogy" in which the Court was dismissive of the potential of section 2(d) to protect collective bargaining rights. Reference re Pub. Ser. Employee Relations Act, [1987] 1 S.C.R. 313; Public Ser. Alliance of Can. v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460.

legislation.³⁰ As a consequence, a legislative amendment excluding them from the benefits of the Act was unconstitutional and held not to be justifiable under section 1.³¹ What is also interesting is the extent to which, in both its section 2(d) and section 1 analysis, the Court focused on the particular problems related to agricultural workers' lack of economic bargaining power. In a sense, the philosophy of the Court's jurisprudence under section 15 was brought to bear in an analysis of the extent to which legislation prevented free association. Putting it another way, the judgment also hinted at section 15 as a possible source of protection in such cases.³²

Obviously, it does not take much for poverty rights activists to see, especially in *Eldridge* and *G.(J.)*, opportunities for the legal assertion of claims to base-level benefits of various kinds. These decisions are at least suggestive of the argument that the state cannot "downsize" by removing certain kinds of support. It remains to be seen, however, how far the Supreme Court of Canada is willing to push what is to this point a thin and situation-sensitive line of jurisprudence.

Indeed, a number of concerns would need to be put aside for the Court to go much further down this road. First, to the extent that many of these kinds of cases involve the Court effectively ordering the government to spend money, reorder budgetary targets, and even alter levels of taxation, it is to be anticipated that there will be much hesitation on the part of some judges.³³ Secondly, for the reach of section 15's equality provision to become truly effective in this domain, the Court must accept poverty or lack of economic status as a ground of disadvantage analogous to those listed explicitly in section 15: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." While this form of argumentation has worked, for example, in the cases of sexual orientation and marital status,³⁴ applying it to economic status would require a significant extension. Thirdly, and similarly, the Court would also have to give new dimensions to the scope of "life, liberty

30. *Dunmore*, 207 D.L.R.4th at 205.

31. *Id.* at 247.

32. Indeed, in her concurring judgment, Justice L'Heureux-Dubé noted that she would also have found for the agricultural workers on the basis of section 15, being prepared to hold that they were an analogous category for the purposes of that section. *Dunmore*, 207 D.L.R.4th at 195-96.

33. For an example see *Collins v. Canada* [2000] 2 F.C. 3 (T.D.), *aff'd* [2002] 3 F.C. 320 (C.A.), *application for leave to the appeal to the Supreme Court of Canada dismissed*: [2002] S.C.C.A. no. 198 (P.L.).

34. *Egan v. Canada*, [1995] 2 S.C.R. 513 (sexual orientation); *Miron v. Trudel*, [1995] 2 S.C.R. 418 (marital status).

and security of the person” under section 7 and see it as embracing not just some forms of psychological integrity, but claims to basic level subsistence support as part of “security of the person.” To this point, section 7 has typically operated in the domain of criminal law and in certain forms of administrative proceedings.³⁵ Its substantive (as opposed to procedural) component has been quite slight.³⁶ Indeed, *G.(J.)* is in one sense part of that pattern. While it provides a constitutionally guaranteed right to support, that right is asserted in the context of the operation of the justice system and resistance to the power of the state within that system. Thus, the case cannot be read as providing an argument for state provision of legal aid or assistance in civil litigation between private persons.

To this point, the authorities in support of this larger substantive role for sections 7 and 15 are sparse. Thus, in *Ferrel v. Ontario*,³⁷ a challenge to the Conservative government’s repeal of employment equity laws failed in the Court of Appeal. The plaintiffs claimed that section 15 constrained the government from repealing this legislation, which had been enacted by its predecessor. This argument was rejected on the basis that the province’s Human Rights Code³⁸ contained prohibitions on systemic discrimination in employment and created a process by which victims could seek relief. However, the Court also indicated very strongly that it did not see section 15 as mandating the continuation of such legislation once it had been enacted. Under this view, there would seem to be little room for using the Charter to compel governments to preserve, let alone create, various social and economic programs.

35. See, e.g., *Singh v. Minister of Employment & Immigration*, [1985] 1 S.C.R. 177. However, in the wake of *Blencoe v. British Columbia (Human Rights Comm’n)*, [2000] 2 S.C.R. 307, the room for asserting that a governmental authority has made a decision or otherwise acted in such a way as to deprive someone of the right to life, liberty and security of the person seems quite truncated. See David J. Mullan & Deirdre Harrington, *The Charter and Administrative Decision-Making: The Dampening Effects of Blencoe*, 27 QUEEN’S L.J. 879 (2002).

36. Initial Supreme Court of Canada recognition of section 7’s substantive content occurred primarily in relation to the adjectival aspects of the legal process, as exemplified by the foundation case of *Reference re Section 94(2) of the Motor Vehicle Act, (R.S.B.C.)*, [1985] 2 S.C.R. 486, and its condemnation of absolute liability offences. However, it has now achieved a somewhat broader compass as exemplified by *Regina v. Morgentaler*, [1988] 1 S.C.R. 30 (with respect to the therapeutic abortion provisions of the *Criminal Code*), and the judgment of Justice La Forest in *Godbout v. Longueuil*, [1997] 3 S.C.R. 844 (municipal restriction on the engagement of employees who lived outside the boundaries of the City), subsequently endorsed by the Court in *Blencoe*, [2000] 2 S.C.R. 307.

37. 42 O.R.3d 97 (Ct. App. 1998).

38. R.S.O., ch. H.19, pt. I ¶ 5 (1990) (Can.); *id.*, pt. IV ¶ 32.

However, there is presently a judgment under appeal in the Supreme Court of Canada which raises these issues starkly. In *Gosselin v. Québec (Procureur Général)*,³⁹ the validity of Quebec's social assistance laws is in question. More specifically, the legal challenge questions the validity of offering a level of welfare assistance that is not only below the norm but below subsistence-level standards to those who are between the ages of eighteen and thirty and capable of working. In addition to challenging the law by reference to section 15 and age discrimination, the appellant in *Gosselin* is pleading that it violates section 7 in that the state must provide subsistence-level support as part of its obligation to respect the "security of the person" of its citizens. Should the Supreme Court sustain the latter argument, the decision will expand enormously the reach of section 7.

In this context, two other recent judgments of the Ontario Court of Appeal merit attention. In *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)*,⁴⁰ the Court struck down a regulation that provided an overly expansive definition of what constituted a "spousal" relationship in order to strike persons off the rolls of those entitled to receive basic subsistence-level welfare assistance as a "sole support parent." In so doing, the Court found that the regulation was discriminatory under section 15 of the Charter on a number of bases (sex, marital status, and receipt of social assistance), and that the regulation could not be justified under section 1 of the Charter. Aside from the judgment's effect in restoring many single mothers to the status they possessed as welfare recipients prior to 1995, what is probably most significant is the Court's recognition that, for the purposes of section 15, receipt of social assistance was a category analogous to those listed specifically in the section as designated beneficiaries of the Charter's guarantee of equality. In terms of the capacity of section 15 to protect those on basic-level income support, this is a dramatic evolution in the law. It now remains to be seen what the Supreme Court of Canada has to say on this point in either, or both, *Gosselin* and an appeal from *Falkiner*.⁴¹

39. [1995] R.J.Q. 1033 (Ct. App.). The appellant failed in the courts of Quebec. *Id.* The Supreme Court of Canada heard the appeal on October 29, 2001 and judgment is still under reserve. *Gosselin v. Québec (Procureur Général)*, [1999] C.S.C.R. No. 364 (Que. Ct. App.) (Q.L.).

40. 212 D.L.R.4th 633 (Ct. App. 2000) (Q.L.), *aff'g* 188 D.L.R.4th 52 (Ont. Div. Ct. 2000). Notice of appeal was filed August 12 2002. [2002] S.C.C.A. no. 297 (P.L.).

41. The case left open the issue of whether section 7 possesses a similar capacity to protect the rights of welfare recipients to basic level support. Having found for the respondents on the section 15 issue, the Court felt it unnecessary to move to consider the section 7 argument.

Though of somewhat narrower ambit, the judgment of the Court of Appeal in *Authorson v. Canada (Attorney General)*⁴² also provides a basis on which federal programs that remove prior entitlements might be challenged. While the Canadian Charter of Rights and Freedoms provides no explicit protection for property rights, section 1(a) of the Canadian Bill of Rights,⁴³ a so-called quasi-constitutional statute applicable only in the federal domain, creates “due process” protection in connection with the removal of property rights. This provision has until now been pretty much a dead letter, but in *Authorson*, the Ontario Court of Appeal invoked it to deny effect to a federal provision depriving a group of disabled war veterans of the right to sue the government for maladministration of pension monies that it had been holding on their behalf.⁴⁴ Once again, if this is upheld by the Supreme Court of Canada, the federal government may in the future be subject to some constraints on the extent to which it may abolish programs and diminish economic entitlements.

What must be factored into any consideration of whether the Constitution will provide protection against downsizing, privatization, outsourcing, and their effects, however, is the role of section 1 of the Charter. This uniquely Canadian instrument allows the government to justify what would otherwise be violations of the rights and freedoms enshrined in the Charter by reference to whether those violations are demonstrably justified in a free and democratic society. In addition, both section 33(1) of the Charter and section 2 of the Bill of Rights permit legislative override of the rights guaranteed by sections 7 and 15. This override has been used very infrequently in the case of the Charter,⁴⁵ in part because of the perceived political costs of engaging in such an exercise. Despite previous reluctance, however, governments may become much more willing to use the override clause the more the Court moves into the terrain of economic and social rights by requiring the maintenance of programs and the expenditure of significant funds. Of course, neither section 1 nor section 33(1) affects constitutional rights asserted on the basis of underlying constitutional principles or the Constitution Act, 1867. However, *Lalonde* notwithstanding,

42. 58 O.R.3d 417 (Ct. App. 2002) (Q.L.), *aff'g* 53 O.R.3d 22 (Super. Ct. J. 2000). The Government has filed an application for leave to appeal to the Supreme Court of Canada: [2002] S.C.C.A. No. 205 (Q.L.).

43. *See* Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, Aug. 10, 1960, ch. 44, 1960 S.C. 519 (Can.).

44. *Authorson*, 58 O.R.3d at 455.

45. In the case of the Bill of Rights, there has generally been seen to be little need to resort to the override given the very limited substantive impact of the Bill of Rights. *Authorson* may foreshadow a change of attitude on that point.

there seem to be only limited prospects for a very active jurisprudence constraining government restructuring exercises on either of those bases.

What does give reason for optimism about an active role for the courts are the other recent judgments in which courts have laid the foundation for an expanded role for sections 7 and 15 in the policing of government cutbacks or failures to provide services. Whether these cases remain isolated examples or part of the development of a more comprehensive role for these provisions remains to be seen. In our view, the outcome in *Gosselin* will almost certainly be critical on this point.

II. PRIVATIZATION AND OUTSOURCING—REDUCING EXPOSURE TO LAW?

A. Introduction

There are many reasons for believing that at least some of the kinds of downsizing and privatization exercises in which Canadian governments have been recently engaged will not necessarily decrease the exposure of the relevant fields to the reach of the law. Indeed, in some instances, there may be little or no change in the application of relevant legal liability or accountability principles.

By way of general introduction and illustration of this point, we take up four examples: the privatization of liquor sale in Alberta; the ongoing privatization of power generation, transmission, and distribution in Ontario; the partial privatization of correctional facilities in Ontario; and the blending of public (through the Ontario Securities Commission) and private (through Self Regulatory Organizations) regulation in the Ontario financial services sector. From there, we will examine certain general principles of common law that may become of particular relevance in subjecting either government or private operators to liability in the differently configured state. These are the principles of nondelegable duties and liability for regulatory failure. We also consider the extent to which there may be an increased role for “private attorneys general” in the public law policing of the privatized and outsourced sectors and, indeed, in the spurring into action of regulators.

B. Canadian Examples of "Privatization" and Outsourcing

1. Sale of Liquor in Alberta

One of the obvious targets of privatization has been the sale of liquor for consumption off licensed premises, something that in all provinces (save Quebec) was until recently the preserve of provincially owned retailers. As one candidate in the recent Ontario Conservative Party leadership race so graphically summarized the philosophy, if it is the kind of business that is in the yellow pages of the phone book, the private sector, not government, should almost invariably be doing it.⁴⁶ In Alberta (though not to this point Ontario), this philosophy led the Ralph Klein Conservative government to privatize the sale of liquor very early on in its first mandate. However, it is one thing to privatize an activity; it is another to deregulate it. Thus, at the same time that the government gave up its monopoly, the relevant legislation⁴⁷ also brought the operation of privately owned liquor stores under the regulatory umbrella that had theretofore covered the sale of liquor for consumption on premises by bars, clubs, and restaurants.⁴⁸

At one level, there is always the possibility that, in such a regime, private sector marketers will be more accountable for poor service and defective products than is the case with a government monopoly. Not only are the private operators subject to the dictates of provincial human rights law and other laws of general operation, but they hold their license at the sufferance of the licensing authority.⁴⁹ Failure to adhere to the terms of the license can result in cancellation or suspension, and the threat of invoking that process, in certain situations, can be a much more powerful instrument of consumer rights protection than is practically possible in the instance of the government monopoly.

46. See *Flaherty: Auctioneer of the Public Sphere*, KINGSTON WHIG-STANDARD, Feb. 23, 2002 at 16. Mr. Flaherty lost the leadership race.

47. Gaming and Liquor Act, R.S.A. ch. G-1 (2001) (Can.), available at <http://www.qp.gov.ab.ca/documents/acts/g01.cfm>.

48. See *id.*, pt. III.

49. See *id.*, pt. IV.

2. Power Generation in Ontario⁵⁰

For almost a century,⁵¹ Ontario Hydro, a publicly-owned utility, handled much of the generation, transmission, and delivery of electricity in Ontario. All of this changed dramatically in 1998 with the enactment of the Energy Competition Act.⁵² There were two schedules to that legislation. The first, the Electricity Act, established the basis for a new competitive environment for the generation and delivery of electricity in the province, while the second, the Ontario Energy Board Act, revamped the province's regulatory regime.

Ontario Hydro was split into five successor companies,⁵³ with a view to establishing a largely privatized (though still heavily regulated) electricity sector in which the sale of electricity would take place on a competitive basis, with prices set by the market rather than by the Ontario Energy Board. The details of the program are complicated, but critical to the privatization agenda are three principal actors: Ontario Power Generation, which at its inception generated over eighty-five percent of the province's electricity at more than eighty facilities; the new category of power retailers who buy electricity from producers and other sources⁵⁴ and sell it on the now competitive market; and Hydro One, which owns the transmission facilities that transfer electricity to local substations and also a distribution network that sends electricity from substations to homes and businesses. The government has ordered that, within ten years, Ontario Power Generation sell off its assets to reduce its proportion of the power generated in the province to less than thirty-five percent.⁵⁵ In

50. Aside from the relevant legislation, much of the material in this section is derived from Jamie Swift, *A Shock to the System*, TORONTO GLOBE & MAIL, REPORT ON BUSINESS, Jan. 25, 2002, at 41, available at <http://www.robmagazine.com/feb02/ohydro.html>, and KINGSTON WHIG-STANDARD April 27, 2002 at 5.

51. The Hydro Electric Power Commission of Ontario, Ontario Hydro's predecessor, came into existence in 1906. Swift, *supra* note 41.

52. S.O., ch. 15 (1998) (Can.).

53. Though it is beyond the scope of this article, an explanation for the impetus behind the entire exercise may emerge from an examination of the third of the new corporations, the Ontario Electricity Financial Corporation, which is responsible for the \$21 billion "stranded" debt of Ontario Hydro. Swift, *supra* note 41. The extent of the utility's debt does much to explain why the exercise was undertaken in the first place, and the transfer of much of that debt to this new Corporation was obviously aimed at ensuring that potential buyers of various parts of the old utility would not be deterred by the specter of potentially crippling debt. *Id.* However, the sale of Hydro One and other assets was the means by which the Government hoped to relieve the public purse of some of that debt load.

54. By no means do they have a monopoly. Local utilities and major corporate users of electricity have the capacity to and do buy directly.

55. Ontario Power Generation has already leased a number of its nuclear reactors to British Energy and is now proposing to privatize safety analysis at its nuclear reactors. This will also involve a British company, NNC Ltd., a subsidiary of British Energy. Paul Waldie, *Reactor Safety Inspection To Be Privatized*,

addition, it was contemplated that Hydro One would be privatized through an initial public offering to take place during 2002. As a result of litigation,⁵⁶ those plans are now on hold and are being reconsidered.

Within this scheme, the regulatory environment also became more complex. The Independent Electricity Market Operator (IMO), a non-profit corporation, was created to police the competitive environment and to ensure continuity of supply, and the Electrical Safety Authority, another non-profit company, was established to set and ensure safety standards and to issue certificates. Overseeing much of this activity is the reconfigured Ontario Energy Board. Though it has lost its capacity to set prices through traditional rate regulation, the Board remains responsible for ensuring competition in the market and for overseeing its operation.

Without a doubt, these are major changes. However, even though rate regulation by a utilities board is a thing of the past, the new environment is by no means a deregulated one. Rather, the forms of regulatory control (and, ultimately, judicial scrutiny) of the now fragmented industry have taken on a different complexion. Moreover, the new legislation perpetuates the old common-law public utilities principle that it is the duty of the utility to make service available on a non-discriminatory basis.⁵⁷ In ensuring respect for that principle, the Ontario Energy Board will undoubtedly have the capacity to engage in ex-post facto scrutiny of pricing and access practices of the various private and public actors who participate in the new environment. Indeed, that role is further emphasized in section 1(c) of the Electricity Act, which calls

TORONTO GLOBE AND MAIL, July 11, 2002, available at <http://www.electricityforum.com/news/jul02/reactor.htm>.

56. On virtually the eve of the IPO for Hydro One, two unions representing hydro workers—the Canadian Union of Public Employees and the Communications, Energy and Paperworkers Union—successfully challenged the privatization. See generally *Payne v. Ontario (Minister of Energy, Sci. & Tech.)*, [2002] O.J. No. 1450 (Super. Ct. J.) (Q.L.). The basis of the challenge was that the new Electricity Act, under which the privatization exercise was supposed to occur, permitted the government only to hold and acquire shares in Hydro One, but not to sell them. The legislation made no reference to selling the shares. The evidence established that virtually every other privatization in Canada and Britain was backed by specific provisions that enabled provincial and federal governments to sell shares in Crown corporations. An appeal from this judgment was dismissed for mootness because the government introduced amending legislation providing the necessary statutory authority for the IPO. *Payne v. Ontario*, O.J. No. 2566 (Ct. App. 2002) (Q.L.). However, the litigation and the public furor generated by the whole proposal have caused the government to have second thoughts and what will now happen to Hydro One remains a matter of conjecture. See *Ontario Seeks Power Partner*, KINGSTON WHIG-STANDARD, July 6, 2002, at 1.

57. Electricity Act, S.O., ch. 15, sched. A § 1(b) (1998) (Can.).

upon the Board to “protect the interests of consumers with respect to prices and the reliability and quantity of electricity service.”⁵⁸

Of course, there is no guarantee of the effectiveness or vigilance of this new regulatory regime. However, it is worth noting that there has at least been a resource commitment to this aspect of the process. According to one commentator, the government has tripled both the staff and the budget of the Ontario Energy Board since 1998.⁵⁹ It is also worth noting that, while it was a publicly-owned utility, Ontario Hydro operated largely at arm’s length from government. As a result, it enjoyed certain legal privileges not possessed by the central branches of government, such as immunity from the jurisdiction of the provincial Ombudsman and exemption from freedom of information legislation. Not surprisingly, those immunities continue for the new and reconfigured participants in the power industry.

3. *Partially Privatized Correctional Services in Ontario*

As noted earlier, in *Eldridge*, the Supreme Court extended the reach of the Charter to those who were delivering or carrying out a specific government program, such as the provision of state sponsored and funded medical services.

The scope of that extension remains unclear. However, it is doubtful that it would cover the privatized sale of liquor, much less the supply of electricity, particularly given the express recognition in the relevant legislation of the public utility principle. Nonetheless, there is the possibility that, in the case of those examples, the Charter no longer applies directly as a constraint on the way in which private suppliers operate their businesses. The common law, provincial human rights legislation, and any specific constraints in the statute or imposed by the relevant regulators may have to do. However, with respect to the third example, the partial privatization of correctional facilities, there seems little or no doubt that the private operators will remain subject to the constraints of the Charter in the way in which they deal with inmates or prisoners.

Not only is the physical confinement of the convicted seen as part of the government’s role even under the most minimalist conceptions of the role of the state, but it is also at the core of section 7 of the Charter and its protection of the right to “life, liberty and security of the person.” As Justice La Forest pointed out in his judgment for the Court in *Eldridge*, it would be odd indeed if

58. *Id.* § 1(c).

59. Swift, *supra* note 41, at 46.

government, through the simple expedient of delegation or contracting out to the private sector, could avoid its central Charter responsibilities.⁶⁰

Indeed, these considerations aside, the particular form of legislative model that Ontario has chosen to permit the use of private correctional facilities clearly bespeaks their operation under the dictates of specific government policies. In the Ministry of Correctional Services Act,⁶¹ the contracting out of responsibility for correctional services is established within the framework of the overall purposes and policies of the Act. That all of the normal rights and potential liabilities of inmates apply is reinforced by the application of the regulations under the Act to privately- and publicly-operated facilities alike. Section 57.1 states that the contractor and its employees “shall, for the purposes of the Act, be deemed to be employed in the administration of the Act.”⁶² The Act also specifies that privatized facilities shall continue to be subject to the jurisdiction of the provincial ombudsman.⁶³ There seems little reason then to doubt that, like the hospitals in *Eldridge*, operators of these facilities are subject to the dictates of the Charter.

One might also venture to suggest, though there is as yet no authority on this point, that the actions of such operators, when taken under a specific statutory power, would also attract the application of the province’s Judicial Review Procedure Act.⁶⁴ In other words, they would be subject to public law remedies for failing to live up to statutorily mandated standards governing matters such as disciplinary hearings and the provision of required facilities. In short, the legal world for those incarcerated in private prisons in Ontario may have changed very little, if at all.

4. *The Financial Services Blended Regulatory Model*

a. *Introduction—The Model*

The model of regulation used in the financial services/securities sector blends public and private control and involves government delegation of some, but not all, control over capital markets. The relationship between the Ontario

60. *Eldridge*, [1997] 3 S.C.R. at 657-60.

61. R.S.O., ch. M.22, pt. V.1 (2000) (Can.).

62. *Id.* § 57.1

63. *Id.* § 57.7.

64. R.S.O., ch. J.1 (1990) (Can.).

Securities Commission (OSC)⁶⁵ and a stock exchange or a self-regulatory organization (SRO)⁶⁶ is one in which the OSC retains control over financial services through recognition and oversight while the stock exchange and the SROs regulate the operation, standards, and business conduct of their members. Through various powers specified in the Securities Act⁶⁷—the power of recognition, the power to attach conditions and terms on recognition, and the power to intervene with respect to stock exchange and SRO bylaws, rules, and regulations—the OSC retains control over the capital markets.

More specifically, Part VIII of the Securities Act sets out the model for self regulation. An SRO is formed by the industry and applies to the OSC for recognition. The OSC, pursuant to section 21.1(1), may recognize the SRO if it is satisfied that to do so would be in the public interest.⁶⁸ The OSC can also impose terms and conditions on the recognition, pursuant to Section 21.1(2).⁶⁹ Once recognized, the SRO, in accordance with section 21.1(3), is responsible for regulating the operations, the standards of practice, and the business conduct of its members and their representatives.⁷⁰ This is done in accordance with the SRO's bylaws, regulations, policies, procedures, practices, and interpretations. Section 21.1(4), however, empowers the OSC to make any decision with respect to any bylaw, rule, or regulation of an SRO if it is satisfied that to do so is in the public interest.⁷¹ The Securities Act contains similar provisions with respect to the relationship between the OSC and stock exchanges, with one additional provision. In section 21(5), the Act provides that the OSC may, if it appears to be in the public interest, make any decision with respect to four enumerated matters: a) the manner in which the stock exchange carries on business; b) the trading of securities through the stock

65. Canada does not have a national securities regulator such as the U.S. Securities and Exchange Commission.

66. In a very real sense, stock exchanges in Canada are SROs. However, they are treated separately for the purposes of this discussion to the extent that in Ontario, the Stock Exchange is treated somewhat differently under the legislation than is the case for other SROs such as the Investment Dealers Association and the Mutual Fund Dealers Association. It should, however, be noted that Market Regulation Services has been established as a subsidiary of the Toronto Stock Exchange with responsibility for the Exchange's SRO functions—"to develop, administer, monitor, and enforce market integrity and market quality rules applicable to trading." NEIL MOHINDRA, FRASER INSTITUTE CRITICAL ISSUES BULLETIN: SECURITIES MARKET REGULATION IN CANADA 11 (2002).

67. R.S.O., ch. S.5, pt. VIII, § 21(1) (1990) (Can.).

68. *Id.* § 21.1(1).

69. *Id.* § 21.1(2).

70. *Id.* § 21.1(3).

71. *Id.* § 21.1(4).

exchange; c) any security listed or posted for trading on a recognized stock exchange; and d) issuers whose securities are listed or posted for trading on a recognized stock exchange.⁷²

b. Additional Regulatory Tools Available to the OSC

In addition to the powers and oversight described above, the OSC has several regulatory tools available for use in regulating markets. It issues policy statements, blanket orders and rulings, and notices to the industry. These tools provide the OSC with power to regulate in a flexible and responsive manner. The Securities Act, in section 143, grants the OSC the authority to make rules that have the effect of regulations in respect of a range of fifty-six specified matters.⁷³ This rulemaking authority is coupled with mechanisms to provide appropriate procedural safeguards and an opportunity for public participation. Section 143.2(1) requires notice of any proposed rule and specifies the content of such notice. On publication of a notice, the OSC must, in accordance with section 143.2(9), provide stakeholders with a reasonable opportunity to make written representations with respect to the proposed rule within a period of at least 90 days after publication. Section 143.3(1) requires that the rule and supporting documents be delivered to the Minister for approval. Fifteen days after the approval, or on another date specified in the rule, the rule comes into force (s. 143.4 (1)).

c. The Mutual Fund Dealers Association as an Example of an SRO

The Mutual Fund Dealers Association (MFDA), an SRO recently recognized by the OSC, provides an illustration of the relationship between the OSC and an SRO. The MFDA is responsible for regulating dealers selling mutual funds. It exists to “enhance protection for investors who purchase mutual funds from the more than 55,000 salespersons working for firms that will be members of [the MFDA]”⁷⁴ and to maintain public confidence in the capital markets.⁷⁵

72. *Id.* § 21(5).

73. This provision was created in response to the judgment of the Ontario Court of Appeal in *Ainsley Fin. Corp. v. Ontario Sec. Comm’n*, 21 O.R.3d 104 (Ct. App. 1994), holding that, in the absence of specific statutory authority, the OSC lacked the capacity to engage in rule-making.

74. *MFDA Applies for Recognition as SRO*, MFDA NEWS RELEASE, Jan. 17, 2000.

75. *See SRO For Mutual Funds Distributors to be Established*, MFDA NEWS RELEASE, Nov. 24, 1997.

In November 1997, the Investment Dealers Association of Canada (IDA) and the Investment Funds Institute of Canada (IFIC) agreed on the establishment and operation of the MFDA as a self-regulatory organization for mutual fund distributors. The collaborative model is an SRO managed by the IDA with shared governance and support, in principle, of the Canadian Securities Administrators. The MFDA was incorporated as a non-profit corporation, and established a board of directors, organizational structures and committees, as well as policies and by-laws. In December 1999, the MFDA applied to each of the Ontario, Alberta, and British Columbia Security Commissions for recognition.

On February 6, 2001, the MFDA was recognized in Ontario, subject to certain conditions, by the OSC.⁷⁶ Previously, on June 16, 2000, the OSC had published the application for comment. After extensive consultation with the industry and the public, the OSC considered the comments it received and proposed certain recognition criteria. Accordingly, the MFDA, on December 18, 2000, filed a revised application for recognition as an SRO and was subsequently recognized.

On the date of recognition, the OSC created Rule 31-506, titled "SRO Membership—Mutual Fund Dealers," which was subsequently approved by the Minister of Finance on April 6, 2001. Rule 31-506 requires all mutual fund dealers to apply for membership in the MFDA within 30 days of the rule coming into force, and to become members of the MFDA by July 2, 2002. A dealer who is not a member of the MFDA from and after July 2, 2002 will be in breach of securities laws. It may be inappropriate for a mutual fund dealer who is not qualified to be a member of the MFDA to continue to act as a dealer, and, as a result, a mutual fund dealer in this situation may have its registration revoked.

Commission Rule 31-506 did not change OSC registration requirements. The OSC did not delegate registration functions to the MFDA. A person or company wishing to become a mutual fund dealer is still required to register with the OSC, but will be subject to the additional requirement of membership in the MFDA by no later than July 2, 2002. A person or company who applies to the OSC for registration as a mutual fund dealer once the rule is in force must file an application for membership with the MFDA on the same date it files its application for registration with the OSC. If a mutual fund dealer does

76. Ontario Securities Commission, MFDA Recognition Order, Feb. 6, 2001, available at <http://www.mfda.ca/SRO-Recognition/OSC.Recognition.Order.pdf>.

not meet the relevant deadline to file the application it is in violation of securities laws.

With recognition, the MFDA has received a degree of regulatory authority, in accordance with section 21.1(3) of the Securities Act, to regulate the operations and the standards of practice and business conduct of its members in accordance with its bylaws, rules, regulations, policies, procedures, interpretations, and practices. The MFDA has the power to enforce standards and conduct investigations. A nineteen-page schedule describes the conditions attached to the recognition.⁷⁷ The conditions address matters including status as a non-profit corporation, corporate governance, fees, compensation or contingency trust funds, membership, compliance, and discipline of members.

Condition 9, titled "Due Process," provides that the MFDA shall ensure that the requirements of the MFDA relating to admission, membership, imposition of limitations or conditions on membership, denial of membership, and termination of membership are fair and reasonable, including, with respect to notice, an opportunity to be heard or make representations, the keeping of a record, and the giving of reasons and provision for appeals. This due process clause refers to fairness for its members, however, and not to fairness to the public.

In fact, the MFDA rules, bylaws, and policies say little about accountability to the public in the sense that they fail explicitly to extend due process protections to those members of the public who might have complaints against members. Condition 8 of the recognition requires the MFDA to notify the OSC, the public, and the media of any disciplinary hearing of its members as soon as practicable and within certain time lines before the hearing.⁷⁸ Notification of the disposition of any disciplinary hearing is also required. The MFDA Rule Number 2, titled "Business Conduct,"⁷⁹ is as close to the idea of fair process as any other provision in the rules, by-laws, conditions, and policy statements come. Rule 2 simply requires all members to deal fairly, honestly, and in good faith with clients; to observe high standards of ethics and conduct; not to engage in any business conduct or practice that is unbecoming or detrimental to the public interest; and to be professional and trained according to relevant standards.⁸⁰ Responsibility for acts and omissions rests with the

77. *Id.*, sched. A.

78. Ontario Securities Commission, *supra* note 76, ¶ 8(D).

79. Rules of the Mutual Fund Dealers Association of Canada, February 23, 2001, available at <http://www.mfda.ca/Rules/rules.pdf>.

80. *Id.*, Rule 2.1.1.

individual MFDA member and not the MFDA.⁸¹ Each member organization is encouraged to develop policies to ensure adherence to the MFDA standards, rules, and policies.⁸² Nowhere is there mention of any duty owed to the public, or of the process a member of the public is entitled to with respect to business with mutual fund dealers.

However, clause 21 of By-Law No.1 is titled "Review by Applicable Securities Commission,"⁸³ and provides that there is a right of appeal from a decision of the MFDA to the OSC. Clause 27 states "Any Member, Approved Person or other person directly affected" by a decision of the MFDA, of which no further review or appeal is provided in the MFDA By-Laws, may request a securities commission with jurisdiction in the matter under its enabling legislation to review such a decision. The term "or other person directly affected" obviously includes a member of the public. While there is no mention of the MFDA's duty of fairness in its dealings with the public, there is some mention of what a member of the public might do if it is dissatisfied with a decision of the MFDA for which there is no further review or appeal. Whether that opens up the possibility of a court reading in due process protections for aggrieved members of the public remains to be seen.

d. SROs and Stock Exchanges and the Courts

Indeed, for these purposes, much may depend on the extent to which the courts will now see the MFDA and other SROs operating under the umbrella of the Ontario and other Securities Commissions as coming within the ambit of the public law regime. The more extensive the degrees of legislative control, securities commission regulation, and, most importantly, jurisdictional overlap between or blending of the regulatory roles of the OSC and the SROs, the stronger may be the arguments for the application of normal public law principles to the way in which these SROs deal not only with their members, but also with other constituencies affected by their operations. Application of those principles would subject the SROs to the normal natural justice or procedural fairness obligations of public law and to the remedies of public law (in the case of Ontario, the province's Judicial Review Procedure Act).

81. *Id.*, Rule 2.1.2.

82. *Id.*, Rules 2.1.3(b) & 2.1.4(c).

83. By-Law No. 1 (as amended by By-Law No. 3) as enacted and confirmed February 23, 2001.

Once again, the extent of the involvement of public law in the life of the SROs remains unresolved by the courts, at least in the context of the current regulatory environment. In 1992, the Nova Scotia Court of Appeal determined that public law remedies were not available with respect to the Investment Dealers Association's exercise of disciplinary powers over one of its members.⁸⁴ However, that judgment preceded the current rather more comprehensive blended or interconnected regulatory regime. What is also clear is that, in this more integrated world of financial services regulation, the capacities of the OSC and other securities commissions to deal with SROs on the basis of public law principles have also been enhanced. In addition, as is now the case with the Ontario Energy Board, the OSC possesses more financial and personnel resources to enable it to perform this task, a result of the capacity it now has to engage in total cost recovery from market participants.

C. Conclusions

The use of these four examples is not meant to assert that, in the face of often fundamental changes in the role and nature of governance in certain critical domains, all will remain constant in the world of the law, both private and public. That is clearly not the case. However, what we suggest here is that there may be fewer changes and less diminution of citizen protection than is sometimes assumed. The examples are also intended to illustrate that the change from public to private comes in very different forms. For purposes of legal accountability and any assessment of the effects or impact of change, close attention must therefore be paid to the detail of each particular exercise. More generally, however, what a number of the examples clearly demonstrate is that privatization and deregulation do not go hand in hand. Indeed, privatization in many contexts will mean new or expanded state regulatory capacity. Further, though the jurisprudence to support this is still developing, there is every possibility that certain kinds of outsourcing or sharing of responsibilities between the public and the private sector may well have the effect of bringing the implicated private sector operators or actors within the realm of the public law system or regime.

84. *Ripley v. Pommier* (No. 2), 108 N.S.R.2d 38 (App. Div. 1991).

III. AN INCREASED OR CHANGING ROLE FOR SOME PUBLIC LAW PRINCIPLES

A. Introduction

As mentioned in the general introduction, the prospects appear slim, at least in the short term, for any dramatic change in general public law principles as a means of responding to the phenomena with which this paper is concerned. However, there are particular areas of public law where opportunities may arise for asserting claims based on the dislocative effects of the initiation and implementation of government initiatives. Thus, Michael Taggart, writing primarily about developments in New Zealand, has speculated about the prospects for a resurgence and evolution in the common law principles governing the operation of public utilities.⁸⁵ To the extent that market entry or licensure in certain domains has now become the preserve of the private sector, the parallels between judicial control of private and public bodies, particularly by reference to concepts of authority or jurisdiction and procedural fairness, may also be exploited by those adversely affected by the exercises of such power.⁸⁶ In the balance of this paper, we concentrate on three other areas of law where opportunities may exist for courts to impose some measure of accountability.

The first two examples are taken from the law governing the tortious or delictual liability of public authorities: the principles of nondelegable duties and liability for regulatory negligence or failure. The first may be particularly relevant in the context of outsourcing, and the second in the context of transfer from state to private-sector operation subject to regulation. However, our conclusion is that, for a number of reasons, the degree of protection provided under these two principles will not be great and will, in any event, tend to be haphazard or random rather than all-embracing. We then turn our attention to another mechanism that may permit citizens and groups more successfully to use the courts as a forum for subjecting at least some aspects of this changed

85. See Michael Taggart, *Public Utilities and Public Law*, in *ESSAYS ON THE CONSTITUTION* 214 (P.A. Joseph ed., 1995); see also Michael Taggart, *Corporatisation, Privatisation, and Public Law*, 2 *PUB. L. REV.* 77 (1991). But see Mark Aronson, *A Public Lawyer's Responses to Privatisation and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 40, 45-50 (Michael Taggart ed., 1997) [hereinafter *THE PROVINCE OF ADMINISTRATIVE LAW*].

86. David Mullan explores this theme in more detail in *Administrative Law at the Margins*, in *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra* note 85, at 134.

world to legal constraints and discipline: private enforcement of regulatory standards. We discuss this possibility in the knowledge that this would require a reevaluation by the Canadian courts of their traditional antipathy to those who seek public interest standing against regulators who have not been sufficiently vigilant in the enforcement of regulatory standards or, as a surrogate for the regulator, against those not complying with legislated or regulator imposed standards.

B. The Concept of “Nondelegable Duty”

The common-law concept of “nondelegable duty” has the potential to play an expanded role in an environment in which government relies increasingly on private entrepreneurs and institutions to deliver various forms of government services. This concept has been used successfully in tort law to find government, both central and municipal, liable for the negligent acts of independent contractors. The theory behind the principle of nondelegable duties is that where the state privatizes responsibilities for the delivery of government services, legal responsibility nevertheless remains with the state.

1. An Exception to the General Rule

The concept of “nondelegable duty” is an exception to “[t]he general rule at common law . . . that a person who employs an independent contractor will not be liable for loss flowing from the contractor’s negligence.”⁸⁷ In accordance with this general rule, an employer is not liable for harm flowing from the contractor’s negligence as long as the employer was not negligent in hiring and in supervising the contractor and did not hire the contractor to do something unlawful. Notwithstanding this general rule, however, the common law recognizes that where a “nondelegable duty” is involved, an employer is not absolved from liability by engaging an independent contractor.

2. Nondelegable Duty Described

The term “nondelegable duty” captures the idea that where the legislature has entrusted someone with a power to do something, and that person delegates the performance of the work to a third party, the person legislatively entrusted

87. *Lewis (Guardian ad Litem) v. British Columbia*, [1997] 3 S.C.R. 1145 ¶ 49 (McLachlin, J., concurring).

with the power remains legally responsible for discharging the duty of care, whether employees or independent contractors are the means for exercising the power. The work may be delegated, in other words, but not the duty.

In *Lewis (Guardian ad Litem of) v. British Columbia*,⁸⁸ then-Justice McLachlin traced the concept of nondelegable duty back to *Pickard v. Smith*⁸⁹ and to Lord Blackburn in *Dalton v. Angus*,⁹⁰ who described the concept in the following way:

[A] person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.⁹¹

3. *The Leading Canadian Case on “Nondelegable Duty”—Lewis (Guardian ad Litem of) v. British Columbia*⁹²

In *Lewis*, the leading Canadian case on the concept of nondelegable duty, the provincial Crown of British Columbia had employed an independent contractor to remove dangerous rocks beside a highway. There was no dispute that the contractor’s negligence in failing to remove a rock caused the rock to fall on the highway and to kill the driver of a car. The issue was whether because it had engaged an independent contractor to do the work, the respondent British Columbia Ministry of Transportation and Highways was absolved of liability. A unanimous Supreme Court of Canada found the provincial Crown liable for the negligence of the independent contractor, on the basis of nondelegable duty.

The Court began by establishing that there was a duty of care owed by the Ministry to the traveling public. The Courts had previously recognized a duty of care between the Ministry and highway users.⁹³ The Court then considered the nature and extent of the duty and concluded that it was nondelegable. Therefore, the respondent Ministry was liable for the negligence of the independent contractor. The relevant factors on which the Court found a

88. [1997] 3 S.C.R. at ¶ 49.

89. 10 C.B. (N.S.) 470, 142 E.R. 535 (1861).

90. 6 App. Cas. 740 (1881).

91. *Id.* at 829.

92. [1997] 3 S.C.R. 1145.

93. *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

nondelegable duty were (1) the statutory powers granted to the Crown and (2) policy considerations, including the reasonable expectations of highway users.⁹⁴

a. Statutory Powers Granted to the Crown

The Supreme Court of Canada found that, by means of two statutes, the legislature had assigned paramount authority and direction for highway repairs and maintenance to the Ministry. The applicable statutes were the Highway Act⁹⁵ and the Ministry of Transportation and Highways Act (MTHA).⁹⁶ The former statute, in section 33(1), vested the Ministry with “control of the construction and maintenance of every arterial highway.”⁹⁷ The latter statute, in section 48, provided that, “[t]he minister shall direct the construction, maintenance and repair” of all highways.⁹⁸ Section 14 of the MTHA provided that “[t]he minister has the management, charge and direction of all matters in relation to the acquisition, construction, repair, maintenance, alteration, improvement and operation of . . . highways.”⁹⁹ The Court concluded that this statutory authority, when exercised, gave rise to a duty to perform that work with reasonable care.¹⁰⁰ The Court noted no specific statutory exclusion from the duty that arose from the authority to manage, control and direct the repair and maintenance of the highways.

The Court considered the circumstances within which the government exercised its statutory authority. Because the circumstances in *Lewis* involved the safety of the public, the Court concluded it would be fair to hold the Ministry liable for the negligence of the independent contractor. The Court wrote:

It is but fair that when a public authority exercises the statutory authority and power granted to it in circumstances which may have serious consequences for the public interest that it be held liable for a breach of duty occasioned by the negligent acts of its contractor. In those circumstances, it is

94. *Id.* at 1236-47.

95. Highway Act, R.S.B.C., ch. 167 (1979) (now R.S.B.C., ch. 188 (1996)) (Can.).

96. Ministry of Transportation and Highways Act, R.S.B.C., ch. 280 (1979) (now R.S.B.C., ch. 311 (1996)) (Can.) [hereinafter MTHA].

97. R.S.B.C., ch. 167 s.33(1) (now R.S.B.C., ch. 188, s. 30(1)) (Can.).

98. R.S.B.C., ch. 280, s.48 (now R.S.B.C., ch. 311, s.22) (Can.).

99. R.S.B.C., ch. 280, s.14 (now R.S.B.C., ch.188, s.12) (Can.).

100. *Lewis*, [1997] 3 S.C.R. at ¶ 23.

both appropriate and just to hold a public body ultimately responsible for ensuring that reasonable care is taken in the work necessary to carry out its authority.¹⁰¹

b. Policy Reasons, Including the Reasonable Expectations of Highway Users

The Court found it logical and reasonable to assume that highway users look to the government to take reasonable care in the construction and maintenance of provincial highways, and that they would expect the Ministry to be responsible for the negligence of its contractors.¹⁰² The Court relied on a case decided by the Australian High Court, *Kondis v. State Transport Authority*,¹⁰³ in which Justice Mason stated:

[I]t appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed

In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.

The Court found that the particular vulnerability of the traveling public was a significant factor in concluding that the government could not escape liability for negligent repair work by delegating it to an independent contractor. The traveling public is not in a position to assess the contract for construction work, and it should be able to look to the Ministry as the entity responsible for taking reasonable care in carrying out repairs and maintenance of the roads. Because

101. *Id.* ¶ 24.

102. *Lewis*, [1997] 3 S.C.R. at ¶ 32.

103. 154 C.L.R. 672, 687 (1984) (Austl.) *cited in id.*

the Ministry is in complete control of repair and maintenance, the public should be able to depend on the Ministry for the reasonable performance of the work.

Broader policy reasons supported a finding of a nondelegable duty owed by the Ministry. The Court found it unfair for a person injured on the road due to a contractor's negligence to have to seek out the identity of the contractor responsible in order to bring an action, and to trust that the contractor is financially responsible.¹⁰⁴ Where more than one contractor is involved in road work, it would be unfair for the member of the public to search out the responsible contractor(s).¹⁰⁵ Moreover, the Court wrote that "it cannot be forgotten that the Ministry is in complete control of this work. It is the Ministry that lets contracts for the work to be performed."¹⁰⁶ The Ministry, the Court suggested, could arrange for indemnification from the contractor.¹⁰⁷

In the companion case to *Lewis, Mochinski v. Trendline Industries Ltd.*,¹⁰⁸ the Supreme Court of Canada held that for the reasons set out in *Lewis*, the British Columbia Ministry of Transportation and Highways was liable for the injury causing negligence of an independent contractor in performing road maintenance work.

4. *Nondelegable Duty in Canada after Lewis*

The concept of nondelegable duty may arise in various situations. In *Lewis*, the Court adopted a "principled approach dependent on the circumstances of the case at hand, to determine when a nondelegable duty should be imposed."¹⁰⁹ Three companion cases involving the issue of nondelegable duty are currently under reserve in the Supreme Court of Canada, waiting to be inscribed for hearing. In each of these cases, the British Columbia Court of Appeal split two to one on the issue of whether the provincial Crown was liable on the basis of breach of non-delegable duty. These cases provide further examples of circumstances in which a nondelegable duty might arise. They also illustrate that the concept of "nondelegable duty" is not clear-cut, and that there is disagreement about when such a duty arises.

104. *Lewis*, [1997] 3 S.C.R. at ¶ 35.

105. *Id.*

106. *Id.* ¶ 36.

107. *Id.* ¶ 37.

108. [1997] 3 S.C.R. 1176.

109. *Lewis*, [1997] 3 S.C.R. at ¶ 54.

Two of these cases, *B.(K.L.) v. British Columbia*¹¹⁰ and *B.(M.) v. British Columbia*,¹¹¹ involve actions for damages brought by plaintiffs against foster parents and the Province for sexual assaults they allegedly experienced while placed as children in foster care homes. Two judges of the British Columbia Court of Appeal, Justices Prowse and MacKenzie, held in each case that the Province was responsible for the torts of the foster parents on the basis of nondelegable duty.¹¹² They held that the trial judge erred in using the concept of vicarious liability to analyze the fault of the foster parents. Because the role of foster parents with respect to the Crown was more properly characterized as that of an independent contractor than that of an employee, the preferable analysis was that of nondelegable duty. The two appellate judges held the Crown liable on the basis of breach of nondelegable duty to care for children for whom it was the legal guardian. This duty could not be delegated to an independent contractor; the Province could not satisfy its duty of care by delegating the care of children to others. In *B.(M.)*, Justices Prowse and MacKenzie found a nondelegable duty on the part of the Superintendent of Child Welfare to ensure that due care was taken of the plaintiff while in foster care, and held that the Superintendent had breached that duty. The Superintendent could not escape responsibility for ensuring that his duties were carried out properly simply because the Protection of Children Act¹¹³ permitted the Superintendent to appoint others to act for him in carrying out his duties.

The remaining appellate judge, Chief Justice MacEachern, found in both cases that the legislation did not impose a nondelegable duty on the Crown. In *B.(M.)*, he held that the Superintendent did what the Act expected and authorized him to do, that is, place a child in a family home—a situation in which there were always risks.¹¹⁴ The provision did not guarantee safety. He further held that without more specific legislative direction and precise statutory wording, the statute did not impose a nondelegable duty upon the Superintendent to pay damages for all harm done by others to a child in foster care.¹¹⁵

110. 197 D.L.R.4th 431 (B.C. Ct. App. 2000).

111. 197 D.L.R.4th 385 (B.C. Ct. App. 2000).

112. In *B.(K.L.)*, a limitation period barred recovery. *B.(K.L.)*, 197 D.L.R.4th 431.

113. Protection of Children Act, R.S.B.C., ch. 303 (1960) (Can.).

114. *B.(M.)*, 197 D.L.R.4th at ¶ 148.

115. *Id.* ¶¶ 151, 158.

The third of the companion cases, *G.(E.D.) v. Hammer*,¹¹⁶ involves an action for damages brought by a student against a school board for sexual assault by a school janitor over a two-year period at an elementary school. The janitor reported to a custodial operations manager of the school board. The trial judge, Judge Vickers, found against the janitor, but dismissed the action against the school board.¹¹⁷

The British Columbia Court of Appeal, on a two to one basis, dismissed the student's appeal. Justice MacKenzie and Chief Justice MacEachern decided that the claim based on nondelegable duty should fail because the tort was committed outside the course and scope of employment.¹¹⁸ They held that because there was no vicarious liability, there could be no liability for breach of nondelegable duty.¹¹⁹ In their view, if a claim for vicarious liability fails because the employee's tort was committed outside the course and scope of employment, then any claim for breach of a nondelegable duty of the employer must also fail.¹²⁰ They held that the rationale for breach of nondelegable duty is to extend liability for torts of independent contractors in appropriate cases where there would be vicarious liability if the independent contractor were an employee.¹²¹ They noted that, in *Lewis*, the liability of the Crown was for the negligence of an independent contractor and therefore there was no employment relationship that would have allowed a claim for vicarious liability.¹²² In the foster parent cases, the foster parents were contractors and not Crown employees. They concluded that they were not aware of any case where liability for breach of a nondelegable duty has been entertained for the tort of an employee where vicarious liability for the employee's tort has been rejected.¹²³

The dissenting appellate judge in *G.(E.D.)*, Justice Prowse, found that liability should lie against the school board on the basis of a nondelegable duty.¹²⁴ The Public Schools Act¹²⁵ gave the school board de facto supervisory

116. 197 D.L.R.4th 454 (B.C. Ct. App. 2000).

117. *Id.* at 472.

118. *Id.* at 476.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 476-77.

124. *Id.* at 474.

125. The Public Schools Act, R.S.B.C., ch. 319 (1960), amended and replaced by School Act, R.S.B.C., ch. 375 (1979) (Can.).

powers over the schools in its district, including the power to hire and fire support staff. Prowse wrote that the Public Schools Act gave the Minister of Education charge of the maintenance and management of all provincial schools established under the Act.¹²⁶ Children were statutorily compelled to attend school and abide by the direction of the teacher. The school board had a nondelegable duty to ensure that reasonable care was taken for the safety of those children while on school premises. The student was victimized by a person hired by the board, the very entity charged with the responsibility to provide a safe learning environment.¹²⁷

In response to the reasoning of her colleagues on the issue of vicarious liability and its relationship to nondelegable duty, Justice Prowse stated that there was a significant difference between breach of nondelegable duty and vicarious liability.¹²⁸ Breach of nondelegable duty is a direct form of liability, whereas vicarious liability is an indirect form of liability. Additionally, breach of nondelegable duty focuses on the breach by an employer of its personal duty to the victim, whereas vicarious liability focuses on the indirect responsibility of an employer for the acts of its employees.

a. Limits of the Concept of Nondelegable Duty

Although the concept of nondelegable duty may be invoked more frequently than in the past, as a consequence of increases in outsourcing, it does have its limits. First, the applicable statute must indicate that the respondent's duty to take reasonable care cannot be satisfied by delegating the work to an independent contractor. At the very least, a statute must assign authority to a Ministry. Arguably, the legislative grant of power must specifically and precisely grant power and authority to the relevant Minister. The more precise and specific the legislative grant is in granting paramount authority and control to the Minister, the more likely there will be agreement that a nondelegable duty may exist. The foster care cases illustrate this point. Chief Justice MacEachern, in dissent, did not find the wording of the Protection of Children Act precise or specific enough to lead to a conclusion of a nondelegable duty on the part of the Superintendent of Child Welfare. His colleagues, on the

126. *Id.* at 472-73.

127. *Id.* at 458-59.

128. *G.(E.D.)*, 197 D.L.R.4th at ¶ 30.

other hand, found the assigned responsibility broad enough and specific enough to lead to a nondelegable duty.

Provided that a clear legislative grant of authority exists, the facts must also give rise to a duty of care, either recognized at law or worthy of recognition at law, as prescribed by the test in *Anns v. Merton London Borough Council*.¹²⁹ Only where this has been established can one step back and assess whether the legislative grant is one which imposes a nondelegable duty on the government. As indicated by *Lewis*, the courts will consider the circumstances in which the government exercised its statutory authority. Specifically, the court will consider whether they involve matters such as public safety or other serious consequences for the public interest.

Second, policy reasons, including the reasonable expectations of the public in question, must indicate that the duty should remain with the government. As *Lewis* illustrates, analyzing this question involves consideration of the particular vulnerability of the public in question. In addition, as evidenced by the judgment of the British Columbia Court of Appeal decision in *Lewis*, the Courts are concerned that a finding of nondelegable duty may, in some circumstances, amount to rendering the government in question an insurer for the negligence of the independent contractor.

It is true that a government aware of the principle of nondelegable duty may avoid liability by adding an indemnification clause in its contract with the independent contractor. Under such an arrangement, however, the government would remain the responsible and liable party; the contractor would simply indemnify the government for its losses. This is not problematic. What is problematic for accountability and fairness is the ability of a government, recognizing that a grant of power may lead to a nondelegable duty, to draft its statutes to avoid such a finding. It might do this by ensuring that there is no clear legislative grant of authority to government, thus shielding itself from the principle of nondelegable duty, or it might do this by a straightforward legislative exclusion of the possibility.

In terms of the examples dealt with in this paper, it is useful to reflect on whether the government retains responsibility for any of the relevant activities on the basis of nondelegable duty, rather than on the basis of the Charter or its role as regulator of the now privatized sector. In the case of power generation, transmission, and delivery in Ontario, the situation is by no means clear-cut.

129. [1978] A.C. 728 (H.L.) (U.K.).

While the entire restructuring is one that has as its objective a significant diminution in the responsibility of the government, at least in the short term, the enterprise continues to involve a blend of public and private sector responsibilities. For the present, both Ontario Power Generation and Hydro One remain under the effective control of the government, even though they are both commercial companies. Moreover, the government is entitled to acquire shares in each of these corporations.¹³⁰ In addition, the IMO, while a corporation in legal form, is in fact a without-share, nonprofit regulator. Section 1 of the Electricity Act, in its statement of purposes, also contains evidence of continuing government responsibility for the overall functioning of the industry. Thus, as seen already, it promises “protection of the interests of consumers with respect to prices and the reliability and quality of electricity service.”¹³¹

On the other hand, the Act specifies in relation to each of Ontario Power Generation,¹³² Hydro One,¹³³ and the IMO¹³⁴ that they are not agents of the Crown for any purpose. By and large, they function as independent entities, and the contemplation is that it will reduce dramatically its holdings in generation plants, while Hydro One remains a candidate for either total or partial privatization. It may also not be advisable to place too much emphasis on specific objectives in the legislation’s specification of purposes. Protection of the public interest is, not surprisingly, a stated objective of most regulatory statutes, and does not mean that those who participate in the regulated industry or activity are engaged in performing a nondelegable duty. Indeed, in the case of the Electricity Act, it is probably more appropriate to treat the consumer protection aspirations of the Act as directed to the various regulators, including the revamped Ontario Energy Board. Moreover, to the extent that Section 1 also speaks of facilitating competition, a smooth transition to competition,¹³⁵ and promoting economic efficiency in the industry,¹³⁶ the indicators are obviously in the other direction; this is primarily a privatization exercise in which the government is shedding itself of previous responsibilities.

130. Electricity Act, S.O., ch. 15, § 53(2) (1998) (Can.) (Ontario Power Generation); § 50(2) (Hydro One). The government can also take securities in IMO. *Id.* § 17(1).

131. *Id.* § 1(c).

132. *Id.* § 53.1(2).

133. *Id.* § 48(2).

134. *Id.* § 6.

135. *Id.* § 1(a).

136. *Id.* § 1(d).

The structure of the Act also is one that stresses the autonomous nature of the relevant corporations. Certainly, as noted already, the government can acquire shares in two of the corporations. As well as being obliged to report to the Minister annually,¹³⁷ all three can be required to submit additional reports at any time.¹³⁸ However, there is no sense at all in which the Minister or the government is involved in the day-to-day running of any of the three corporations, or even on an occasional basis through the use of a directive power. In short, in terms of one of the key indicators of whether a nondelegable duty is involved—the relevant statute’s support of abiding ministerial or government responsibilities—this case seems to present a strong counter-example against the existence of any nondelegable duties. Our view, therefore, is that this concept is not likely to be one that plays any role in disciplining the functioning of the reconfigured markets for electricity in the province.

With respect to correctional services in Ontario, as discussed, the government of Ontario has chosen partial privatization within the framework of the already established public correctional system. For this reason, there very likely remains a nondelegable duty on the government with respect to correctional services. The Ministry of Correctional Services Act,¹³⁹ in section 4, assigns responsibility for the administration of the Act, and therefore for correctional services, to the Minister of Correctional Services. section 57.7 of the Act deems a contractor to be a government organization for the purposes of the Ombudsman Act,¹⁴⁰ and section 57.8 states that the statute prevails over any contract. Clearly, the legislature has engaged in this partial privatization with knowledge of the implications of not allowing Charter protections in the correctional setting and with a desire to ensure the protection of the broader public interest, as well as the interests of inmates, in private-sector operation of correctional institutions.

As to the privatization of the sale of liquor in Alberta: as discussed, it is one thing to privatize an activity and quite another to deregulate it. Because the Alberta government did not deregulate sales, the Alberta Gaming and Liquor Act applies to sales in private retail outlets as well as to sales in Alberta Liquor Control Board stores. The statute grants authority to the Gaming Commission,

137. *Id.* §§ 53.4(1), 50.4(1), 21(1).

138. *Id.* §§ 53.4(4), 50.4(4), 22.

139. R.S.O., ch. M-22 § 4 (1990) (Can.).

140. *Id.* § 57.7.

in section 3(d), “to control . . . the manufacture, import, sale, purchase, provision, storage, transport, use and consumption of liquor.” Nonetheless, this retention of regulatory control over the privatized sector in no sense brings the exercise of the license or the franchise within the realm of activities subject to the principle of nondelegable duty. The privatized operators are not fulfilling a statute that imposes a duty on government. In such a context, once again, the only basis for imposing tort liability on the government is by establishing a duty of care running from the vendors of liquor to the general drinking public, and further to establish that that duty of care has been breached as a result of regulatory failure which has caused harm. That is the issue to which we now turn.

C. Tort Liability for Regulatory Failure

Canadian law has long recognized that, in certain situations, tort liability can flow from regulatory negligence. Thus, in the leading judgment of *City of Kamloops v. Nielsen*,¹⁴¹ the Supreme Court of Canada held a municipality accountable for regulatory negligence in administering the granting of building permits. Indeed, in that case, the Court was not deterred by the fact that the claim in question was, in effect, one for economic loss as opposed to physical harm to person or property. Moreover, in the domain of licensing agencies, which we more typically regard as regulators, there is case law to the effect that, provided the usual conditions can be met, a negligent licensing authority may be liable to those who suffer damage to person or property. Thus, in *Swanson Estate v. Canada*,¹⁴² the Federal Court of Appeal held Transport Canada liable to the estates of victims of an air crash for failing to ensure that an airline and its pilots complied with the terms and conditions to which they were subject in the operation of an airline licensed by the Canadian Transport Commission.

Read expansively, these and other authorities might suggest considerable scope for imposing liability on the government for the actions of those enterprises which it has “franchised” or licensed to engage in certain activities subject to conditions and various forms of regulation. Even where there is no room to invoke the principle of nondelegable duty, more general concepts of

141. [1984] 2 S.C.R. 2 (1984).

142. 80 D.L.R.4th 741 (Fed. Ct. App. 1991).

tort liability might provide a basis on which the government or regulator could be held accountable.

Aside from the fact that at least some governments have attempted to ward off the expansion of this form of liability through legislative exclusion or limitation,¹⁴³ the courts themselves have been hesitant to extend the reach of such principles of liability. Thus, in the leading Supreme Court of Canada cases, it has always been accepted that such liability can be invoked only in the domain of operational—and not policymaking—activities, a distinction that has proved quite troublesome from time to time.¹⁴⁴ There have also been considerable doubts as to the extent to which such principles of liability have any application to regulators that are obliged to act in a judicial manner when exercising their powers.¹⁴⁵ Thus, it is significant in *Swanson Estate* that the defendant was not the Canadian Transport Commission, which acted in a judicial-type capacity in granting a license to the relevant airline, but rather Transport Canada, which was thereafter responsible for the day-to-day supervision of the airline's operations.¹⁴⁶ In the same manner, there is considerable doubt as to whether the Alberta Gaming Commission, which holds hearings in determining whether to grant, suspend or cancel a license, would be amenable to a claim of regulatory negligence. Also, *Nielsen* notwithstanding, the scope for asserting this kind of liability against those engaged in economic regulation of various kinds has been very uncertain. Finally, and more generally, the Courts have from time to time limited access to this kind of claim by reference to the need to establish a duty of care.¹⁴⁷ The concept of duty of care has been quite fluid in this domain, mainly as a result of judicial acceptance of overriding policy concerns as a basis for negating liability in situations where a duty of care would otherwise have existed.

The weight of these concerns and exceptions has very recently been reinforced by two companion appeals decided by the Supreme Court on the same day in late 2001. Faced with arguments for a more general principle of

143. See, e.g. the Alberta Safety Codes Act, S.A., S-0.5, s.12 (1991) (Can.), which immunizes (save in the case of bad faith) the province, municipalities, and accredited agencies from tort liability for a range of inspection and evaluative functions.

144. Compare, for example, *Just v. British Columbia*, [1989] 2 S.C.R. 1228, with both *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, and *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

145. See *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957.

146. See *Swanson Estate*, 80 D.L.R.4th at 752.

147. See *Cooper v. Hobart*, 206 D.L.R.4th 193, 208 (Can. 2001); *Edwards v. Law Society of Upper Canada*, 206 D.L.R.4th 211, 218 (Can. 2001).

liability for “regulatory negligence” in the domains of economic and professional regulation, the Court demurred, and, in so doing, lessened dramatically the opportunities for the use of tort as a vehicle for imposing liability in such contexts, both generally and in relation to activities that the government has either privatized or outsourced while still retaining some degree of “regulatory control.”

In *Cooper v. Hobart*¹⁴⁸ and *Edwards v. Law Society of Upper Canada*,¹⁴⁹ the Supreme Court of Canada dismissed appeals by two groups of investors who wanted to sue the British Columbia Registrar of Mortgage Brokers and the Law Society of Upper Canada, respectively. The plaintiffs claimed they had lost millions of dollars in the 1990s due to the regulators’ alleged negligence in overseeing the conduct of a mortgage broker and a lawyer, which included the failure to warn them that their funds were being misused.

The Court applied the two-part approach articulated in *Anns v. Merton London Borough Council*¹⁵⁰ and *Kamloops (City of) v. Nielsen*¹⁵¹ to determine whether a duty of care existed in each situation.¹⁵² The first part of the *Anns* test asks whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care.¹⁵³ The court focuses on factors arising from the relationship between the plaintiff and defendant, including broad considerations of policy. The starting point is to determine whether the case falls within or is analogous to a category of cases in which a duty of care has been previously recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. The second part asks whether residual policy considerations exist which justify denying liability.¹⁵⁴ These include, among other things, the effect on other legal obligations of recognizing that duty of care, its impact on the legal system and, a less precise but important consideration, the effect of imposing liability on society in general.

In *Cooper*, the issue was stated as: “Does a statutory regulator owe a duty of care to members of the investing public for the (alleged) negligence in failing to oversee the conduct of an investment company licensed by the

148. 206 D.L.R.4th 193 (Can. 2001).

149. 206 D.L.R.4th 211 (Can. 2001).

150. [1978] A.C. 728 (H.L.).

151. [1984] 2 S.C.R. 2.

152. *Cooper*, 206 D.L.R.4th at 201-10; *Edwards*, 206 D.L.R.4th at 217-20.

153. *Nielsen*, [1984] 2 S.C.R. at 10.

154. *Id.*

regulator?”¹⁵⁵ The Court determined that this was not a duty of care recognized thus far by Canadian courts. Thereafter, the Court inquired whether the law of negligence should be extended to reach this situation, since, as noted in *Donoghue v. Stevenson*,¹⁵⁶ the categories of negligence are not closed. The Court stated that if factors giving rise to proximity exist, they must arise from the governing statute under which the Registrar is appointed. The Court held that the Mortgage Brokers Act¹⁵⁷ did not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar’s duty was rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar’s overarching duty to the public. The Court reviewed the provisions in the Act and saw the regulatory scheme as providing a general framework for the operation of the mortgage marketplace.¹⁵⁸ The Court stated further that, even if a prima facie duty of care had been established under the first branch of the *Anns* test, it would have been negated at the second stage for overriding policy reasons. These included the following: a duty of care owed by the Registrar would be inconsistent with the Registrar’s need to balance the public and private interests while acting quasi-judicially in deciding whether to remove a broker’s license; the Registrar must make difficult discretionary decisions in the area of public policy, which commanded deference; the “spectre of indeterminate liability would loom large if a duty of care was recognized in this case;”¹⁵⁹ and, finally, the impact of imposing a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the plaintiff investors, would effectively be to create an insurance scheme for investors at great cost to the taxpaying public, absent any legislative intent to do so.

For the same reasons as in *Cooper*, the Supreme Court decided in *Edwards* that no duty of care arose between the respondent Law Society of Upper Canada and the appellants who deposited money into a solicitor’s trust account as participants in a third-party business promotion. The issue was stated as: “Does the Law Society of Upper Canada owe a duty of care to persons who deposit money into a solicitor’s trust account in respect of losses resulting from misuse of the account?”¹⁶⁰

155. *Cooper*, 206 D.L.R.4th at ¶ 20.

156. [1932] A.C. 562 (appeal taken from Scot.).

157. R.S.B.C., ch. 313 (1996) (Can.).

158. *Id.* §§. 4, 5, 6, 7, 8, 14, 20.

159. *See Cooper*, 206 D.L.R.4th at ¶ 54.

160. *See Edwards*, 206 D.L.R.4th at ¶ 7.

The Court held that this was not a situation in which a duty of care had heretofore been recognized, nor was it a case in which a new duty of care should be recognized. The Court stated that the governing statute, the Law Society Act,¹⁶¹ did not reveal any legislative intent to impose a private-law duty on the Law Society. The Law Society Act was intended to protect clients and thereby the public as a whole. However, that did not mean that the Law Society of Upper Canada owed a private-law duty of care to a member of the public who deposited money into a solicitor's trust account. Decisions made by the Law Society required the exercise of legislatively delegated discretion and involve pursuing myriad objectives consistent with public rather than private law duties. The Court noted that a public insurance scheme, funded by the legal profession—the Lawyers' Professional Indemnity Corporation (LPIC)—provided insurance for claims by clients against their lawyers for negligence. The Court concluded that, as in *Cooper*, even if a prima facie duty of care arose between the Law Society and the appellants who deposited money into a solicitor's trust account, such a duty of care would have been negated by residual policy considerations outside the relationship of the parties.

In sum, even leaving aside the “forensic lottery” features of tort as an effective and efficient basis for providing compensation, particularly in the domain of claims against the government and its agencies, the prospects of using a regime of regulatory negligence as a judicial accountability mechanism have been diminished dramatically by these two judgments and the policy perspectives on which they are predicated. At least in the domain of economic loss caused by regulatory failure, even on the part of entities that would seem to be statutorily designated “watchdogs”, there will now be, *Nielsen* notwithstanding, few situations in which those suffering financial setbacks will recover damages against the regulator. Whether the same philosophy is one that the Supreme Court of Canada will in the future apply in cases involving regulatory authorities charged with safeguarding health and physical safety, or the security of real and personal property other than money, remains an open question and, of course, one that is of great moment in the now-privatized but still regulated world.

161. R.S.O., ch. L-8 (1990) (Can.).

D. Private Law Enforcement

Canadian courts have not traditionally been hospitable to public-minded citizens seeking to enforce, either directly or indirectly, adherence by others to legislated or regulator-imposed standards. In this context, the courts have tended to apply the very onerous test for standing developed in the context of citizen actions against public nuisances. Only where the nuisance, action, or inaction affects an individual right of the litigant, or where the litigant is adversely affected in way that differentiates that litigant from the rest of the public, is standing as of right available.¹⁶² Indeed, in the domain of licensing and other forms of business regulation, even competitors have seldom been allowed to challenge the failure of regulators to enforce the law against other participants.¹⁶³ For these purposes, it has not mattered whether the action is one in which the private litigant is seeking a remedy to compel the regulator to engage in appropriate enforcement¹⁶⁴ or is asking the courts to take the place of the regulator and directly ensure compliance with the law by the offender.¹⁶⁵

Aside from a general philosophy that ensuring adherence to the law is primarily the role of government, the courts also not unnaturally tend to view the legislative choice of a particular mode of enforcement as an indicator of exclusivity. Putting it another way, it would be trampling on the prerogatives or discretions of the regulator to allow private enforcement of legislative and, particularly, regulator-imposed standards.¹⁶⁶ Indeed, while the Supreme Court of Canada eventually recognized a limited role for public interest standing in both constitutional and administrative law,¹⁶⁷ the according of such standing

162. See, e.g., *Cowan v. Canadian Broadcasting Corp.*, 2 O.R. 309, 56 D.L.R.2d 578 (Ont. Ct. App. 1996), *appeal denied*, [1966] S.C.R. vii, [1966] R.C.S. vii, at 311 (applying the traditional English standing rule laid down in cases such as *Boyce v. Paddington Corp.*, 1 Ch. 109 (1903)).

163. See, e.g., *Rothmans of Pall Mall Ltd. v. Minister of National Revenue* (No. 1), 2 F.C. 500 (Ct. App. 1976).

164. *But see* *Re District of North Vancouver and National Harbours Board*, 89 D.L.R.3d 704 (Fed. Ct. 1978).

165. See, e.g., *Shore Disposal Ltd. v. Ed DeWolfe Trucking Ltd.*, 16 N.S.R.2d 538, 72 D.L.R.3d 219 (N.S. Sup. Ct. 1976).

166. *Id.*

167. The foundational cases are *Thorson v. Attorney General*, 1 S.C.R. 138, 43 D.L.R.3d 1 (1975) (Constitution Act, 1867); *Minister of Finance v. Finlay*, 2 S.C.R. 607, 33 D.L.R.4th 321 (1986) (administrative law); *Canadian Council of Churches v. Minister of Employment and Immigration*, 1 S.C.R. 236, 88 D.L.R.4th 193 (1992) (Canadian Charter of Rights and Freedoms). With respect to the examples discussed in this paper, it is worth noting that, in *Payne*, Justice Gans relied upon *Finlay* to accord public interest standing to two unions challenging the validity of the IPO of shares in Hydro One, even though one of those unions did not represent the employees of any hydro companies. *Payne v. Ontario* (Minister of Energy,

remains a matter of discretion, not entitlement. One of the critical factors in the exercise of that judicial discretion is the availability of other more convenient or appropriate ways of vindicating the public interest at stake. Obviously, under such a test, the presence of other legislatively designated mechanisms for ensuring enforcement in most instances will count as an equally, if not more, convenient way of ensuring adherence to the law.

All of this would tend to suggest little role, at least under current conditions, for private law enforcement when those engaged in privatized or outsourced activities fail to adhere to the terms and conditions the government has imposed on them, either in primary or subordinate legislation or as part of general or situation-specific directions from a “regulator.” Nonetheless, it may be that the new “regulatory” environment is creating conditions that could lead to a reevaluation of the traditional position. Thus, for example, appeals for judicial deference to the legislative choice of the regulator or a particular mode of enforcement begin to sound somewhat hollow in the face of sustained regulator inactivity or failure, resulting either from a lack of resources or a general philosophy of not wanting to enforce the law for fear of disrupting the economic viability of private entrepreneurs. In the language of the public interest standing test, there may “be no other reasonable and effective manner in which the issue may be brought before a court.”¹⁶⁸ Indeed, in developing this aspect of the discretionary authority of courts to accord public interest standing, the Supreme Court specifically acknowledged that the inquiry to be engaged in was not simply a theoretical one. The courts were to go beyond looking at the other available means of rectifying the wrong to a consideration of whether “there was anyone with a more direct interest than the plaintiff who would be likely to challenge the legislation [or administrative action or inaction].”¹⁶⁹ The courts will be attuned to the realities of what is at stake when called upon to extend the reach of private law enforcement in a privatized environment. One of those realities in a world of “less” government spending is the inadequacy of the resources available to many “regulators,” be they regulatory agencies or offices of central government. The other and more compelling reality will be any increase in the incidence of regulatory failure and adverse consequences flowing from such failures.

Sci. & Tech.), O.J. No. 1450, paras. 8-19 (Super. Ct. J. 2002) (Q.L.). It was sufficient that the union represented a constituency that relied on the availability of affordable sources of electricity. *Id.* at para. 8. See *Hydro One Ruling Potent Union Tool, Lawyer Says*, TORONTO GLOBE & MAIL, Apr. 23, 2002, at B3.

168. See *Finlay*, 2 S.C.R. at 633.

169. *Id.*

As noted earlier, the capacity of tort to alleviate the consequences of regulatory failure is restricted both in terms of the theoretical reach of tort law in such circumstances and its limited availability in a practical sense to those who have been harmed and have legitimate claims. Moreover, even within regimes where tort does supply an avenue of vindication, the after-the-event costs to government, and ultimately the public, of dealing with the fallout will often be astronomical. This is starkly evident in any number of the examples of regulatory failure that feature so regularly in the media and form part of the consciousness of judges. The events in Walkerton, Ontario provide a graphic example. There, failures in regulation of the water supply system, including the default or inadequacy of privatized testing laboratories, led to many deaths and to long-term health consequences for many others.¹⁷⁰ The cost to the public purse of dealing with the immediate and long-term consequences (including the subsequent massive public inquiry¹⁷¹ and the settlement of claims) provides a clear lesson. The same is true of the costs to the federal government and the Anglican and Roman Catholic Churches in dealing with the enormous number of claims arising out of sexual and other forms of abuse in the operation of residential schools for First Nations children by the Churches. All of this may well lead to an environment in which courts are much more sympathetic to claims by private citizens that will, in effect, nip regulatory failure in the bud, particularly in contexts in which the perpetuation of the inadequacies of designated enforcement mechanisms has the potential for catastrophic consequences in the future.

To this point, there is not much authority that can be marshaled in support of this extended role for private law enforcement. However, a recent decision of the Federal Court of Appeal may provide both a basis on which to advance such a claim and a first indicator of changing judicial attitudes. In *Harris v. Canada*,¹⁷² the Federal Court of Appeal allowed standing to a private citizen to challenge an allegedly illegal arrangement between the revenue authorities and a taxpayer with respect to the taxation of an offshore trust. Relying on the public interest standing jurisprudence, and refusing to be bound by an English

170. J. O'CONNOR, REPORT OF THE WALKERTON INQUIRY, PART ONE: THE EVENTS OF MAY 2000 AND RELATED ISSUES 2 (2002), available at <http://www.walkertoninquiry.com/report1/index.html>.

171. See *id.*; see also J. O'CONNOR, REPORT OF THE WALKERTON INQUIRY, PART TWO: A STRATEGY FOR SAFE DRINKING WATER (2002), available at <http://www.walkertoninquiry.com/report2/index.html>.

172. 4 F.C. 37, 187 D.L.R.4th (Ct. App. 2000).

authority¹⁷³ that could be read as denying a role for private law enforcement in revenue matters, the Court held that, as there was no other reasonable and effective manner of testing the legality of the arrangement, it should accord the plaintiff standing to proceed with his claim. The issue at stake was of great public interest, and the taxpayer was certainly not going to question the favorable treatment, nor was the government itself ever likely to rescind whatever agreement it had reached with taxpayer.

Of course, one must acknowledge not only the slimness of the support for this expansion of the scope of private law enforcement, but also the fact that it too will tend to be random or haphazard, and dependent on the existence not only of public-spirited citizens and groups, but of public-spirited citizens and groups with very considerable resources. There must also be serious questions as to how far the courts would be willing to go in developing this mechanism. It is one thing to allow such causes of action when the allegation is, for example, that of a failure by a private-sector deliverer of services to comply with the specific standards expressly created by primary legislation. It is quite another matter, in terms of traditional notions of privity, to countenance the standing of private citizens to enforce the terms of contracts entered into between private-sector actors and government for the delivery of various services. In short, private law enforcement is a poor substitute for state enforcement of standards. However, where the commitment of the state to ensuring compliance is limited, it may at least offer some possibilities for filling the regulatory enforcement gap.

CONCLUSIONS

To those who look to the Canadian courts as a mechanism for imposing some constraints on the privatization, downsizing, outsourcing, and deregulatory activities of governments across the country, this paper conveys a largely depressing message. Whether by reference to principles of constitutional law or administrative law, the possibilities for holding government legally accountable for the initiation and implementation of such programs are, at present, few indeed.

173. In particular, *Reg. v. Inland Revenue Commissioners* [1982] A.C. 617 (H.L.), though some of the speeches in that case were equivocal in the sense of not wanting to lay down a universal rule against taxpayer standing.

Certainly, there are some unresolved issues in the constitutional domain. Indeed, should the Supreme Court of Canada favor the appellant's claims in *Gosselin* on the basis of a broader conception of the substantive role of section 7 of the Charter, this may have the impact of generating a broader range of constitutionally protected rights to at least basic-level income support for Canadians in need.¹⁷⁴ In addition, there may be some prospect for expanded use of certain administrative law or common public law principles for achieving accountability with respect to the implementation of these policies, both in the courts and within the regulatory regimes responsible for supervision of private-sector engagement in functions previously carried on by government.

However, the realistic potential of all of these possibilities may not be all that great, particularly given the ability of government to override Charter protections, to advance Section 1 justifications for derogations from Charter rights and freedoms, and to ensure legislative exclusion of liability for various activities. Indeed, to this ability can be linked the lack of effective access to relevant information and data by reason of the frequent inapplicability of freedom of information legislation,¹⁷⁵ as well as judicially imposed limits on the otherwise most obvious legal principles. More generally, this is the domain of political choice, where the role of the courts and the rule of law is limited or, at least, has traditionally been perceived to be limited, by the courts of this and other common law jurisdictions.

This sense of pessimism is exacerbated by what seems to be an increase in the so-called "democratic deficit." Legislatures in Canada meet less often, the opposition is either fragmented or nonexistent in a number of jurisdictions, and parliamentary committees are increasingly controlled by the governing party and operate under an increasing sense of rigid party discipline. In addition, the concentration of effective power in the hands of cabinet (or frequently a few members of cabinet and their personal advisors), at the expense of caucus and parliament generally, appears to be almost inexorable. Moreover, notwithstanding the obviousness of these problems, there is a real lack of

174. See *supra* note 39 and accompanying text.

175. Secrecy concerns surface frequently in the privatized and outsourced world as the standards of private sector business are advanced as reasons for refusing access to relevant material; to allow arrangements between governments and private sector actors for the delivery of previously public services would be unfair to the competitive position of potential private sector participants and deter many from bidding. See, e.g., *Official Decries Secrecy Rules on Power Costs*, TORONTO GLOBE & MAIL, June 22, 2002, at A10 (with reference to section 14.1 of the Electricity Act, as inserted by R.S.O. 2002, ch. 1) and *Gag order keeps nuclear lease secret*, TORONTO GLOBE & MAIL, Jan. 16, 2002 (both in the context of the "privatization" of Ontario Hydro).

commitment to the project of the reform of parliamentary institutions. Vested interests constantly get in the way.

All of this is particularly alarming in an era of privatization and globalization, when vigilance is especially important in guarding against the potentially disastrous consequences of unconstrained evolution in the extent and impact of both these phenomena. Until now, environmental tragedy and spectacular financial collapses have been the principal spurs to greater public awareness of the need for government to ensure effective, consistent regulation.

Indeed, these are the events that can still bring governments into jeopardy and thus have the capacity to generate policy and regulatory reform, if for no reason other than the self-preservation instincts of the party in power.

However, it is an impoverished view of the role of government to regard it as there primarily to react to disaster and tragedy, as opposed to anticipating problems and putting in place preventative and facilitative mechanisms. These mechanisms are necessary to ensure that a less constrained private sector is sufficiently cognizant of overriding public interests and that fragile national institutions and policies are not the chance victims of globalization. The challenge is therefore primarily that of finding the will to engage in revitalizing traditional parliamentary institutions, and also to see benefit in and encourage the evolution of and participation in surrogate democratic processes.

Public law is not without a role in this project. Indeed, the invocation of public law principles in the courts and before regulatory bodies can itself be a powerful form of alternative democratic involvement, as well as a vital accountability mechanism. Beyond that, Canadians need to reflect carefully on the problem of whether the public law principles that we have presently are ones that are wholly suited to the task ahead. Our own hunch is that there is a need for far greater awareness on the part of courts, particularly of the nature and the dimensions of the potential problems of privatization and globalization.

With this awareness should come a greater commitment to the importance of thinking creatively about the role that public law can play in ensuring that vital public interests do not get overlooked or discarded in these heady days of profound change.

POSTSCRIPT

1. The Supreme Court of Canada rendered judgment in *Gosselin v. Quebec (Attorney General)* on December 18, 2002. The appeal was

dismissed.¹⁷⁶ In terms of matters raised in the body of our paper, the Court did not deal with the issue of whether discrimination on the basis of poverty or economic status could in any circumstances be an analogous ground of discrimination for the purposes of section 15 of the Charter and, while dismissing the claim that the regulatory regime violated Ms. Gosselin's right to "life, liberty and security of the person," the case left open the possibility that, on other facts, a claim to minimum level of support might be asserted. In short, the case did not in fact resolve definitively the critical issues of the extent to which the Canadian Charter of Rights and Freedoms is a social charter.

2. Since this paper was written, much has gone wrong with the privatization of Ontario's power generation, sale, and distribution operations. In June 2002, the Government announced that the sale of Hydro One would not proceed.¹⁷⁷ Earlier that month, the Government had also forced the resignation of the Board of Hydro One over issues of executive compensation and more particularly the severance package given to its departing CEO, a severance package which the Government subsequently reneged on.¹⁷⁸ Then, in November, the Government announced a cap on the price of electricity until 2006, thereby putting on long hold the open market pricing system.¹⁷⁹ Shortly thereafter, the Chair of the Ontario Energy Board resigned in the face of public criticism by the Premier.¹⁸⁰ In the meantime, British Energy, the operator of a number of Ontario nuclear power plants, went into financial free fall,¹⁸¹ causing it to sell its stake. Very obviously, the detail of the exercise recounted in the paper is now proceeding in a somewhat modified manner.

176. [2002] S.C.C. 84.

177. *Eves Kills Harris's \$5-billion Hydro One Sale*, TORONTO GLOBE & MAIL, June 13, 2002, at 1.

178. Paul Waldie et al., *Hydro One Purge Kills IPO, Critics Say*, TORONTO GLOBE & MAIL, June 5, 2002, at 1.

179. Janet McFarland, *Power Failure: Ontario's Aborted Plan*, TORONTO GLOBE & MAIL, November 16, 2002, at B1.

180. Richard Mackie, *Energy Chief Announces Resignation*, TORONTO GLOBE & MAIL, November 14, 2002, at A8.

181. Eric Reguly, *British Energy Debacle Provides Lesson for Privatization Advocates*, TORONTO GLOBE & MAIL, September 17, 2002, at 1.